TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 218.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ADA R. WRIGHT, ADMINISTRATRIX OF D. C. WRIGHT, DECEASED.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED JULY 17, 1913.

(23,797)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 29, 1914.

a United States Circuit Court of Appeals, Sixth Circuit.

No. 2302.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Plaintiff in Error,
vs.
ADA R. WRIGHT, Administratrix of D. C. Wright, Deceased, Defendant in Error.

Error to the District Court of the United States for the Western District of Tennessee.

RECORD.

Original transcript filed April 8, 1912.

1 *Transcript of Record.*

In the District Court of the United States, Western District of Tennessee, Western Division.

No. 4151, C. C.

Mrs. ADA R. WRIGHT, Administratrix of D. C. Wright, Deceased,
vs.
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Stipulation of Counsel.

Filed April 5, 1912. A. G. Mathews, Clerk.

In the above styled case, by agreement of the parties hereto, by their respective attorneys of record, the Clerk of the District Court of the United States for the Western District of Tennessee is directed and requested to omit from the typewritten transcript of the record to be made pursuant to an order granting a Writ of Error to the defendant:

The original Declaration, filed the fourth day of November, 1911.

Said Clerk will also forward to the United States Circuit Court of Appeals the original Exhibits as follows, to-wit:

Exhibit No. 100, to the Bill of Exceptions, being a large scroll drawing.

Exhibit No. 102, to Bill of Exceptions, being a Blue Print.

Done at Memphis, Tenn., this fourth day of April, 1912.

BARTON & BARTON,
Attorneys for the Plaintiff.
FITZHUGH & BIGGS,
Attorneys for the Defendant.

The President of the United States of America to the Marshal of the Western District of Tennessee, Greeting:

You are hereby commanded to summon the Yazoo & Mississippi Valley R. R. Co. a corporation organized under the laws of the State of Mississippi having a place and doing business in the Western District of Tennessee, if to be found within your District, to appear before the Judge of the Circuit Court of the United States, in the Sixth Circuit for the Western District of Tennessee, at Memphis, Tennessee, in said District, on the Fourth Monday in November next A. D. 1911 and then and there to answer Mrs. Ada R. Wright, as administratrix of D. C. Wright deceased, citizen of the State of Tennessee in a plea of Tort (Personal Injuries) to the damage of said plaintiff (as he say-) Fifty Thousand Dollars ($50,000.00).

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Herein fail not, and have you then and there this Writ.

Witness, The Honorable Edward Douglass White, Chief Justice of the United States, and the seal of the said Circuit Court at said Memphis, this fourth day of November A. D. 1911, and the 136th year of American Independence.

[SEAL OF COURT.] DAN F. ELLIOTTE, *Clerk.*

Know all men by these presents, That we, Ada R. Wright, and McKinney Barton held and firmly bound unto said defendant Y. & M. V. Railroad Co. in the sum of Two Hundred and Fifty Dollars; but to be void on condition that the said defendant do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiff, in the Circuit Court of the United States for the Western District of Tennessee, at said Memphis, against the said defendant; and also on failure of the said plaintiff to prosecute the said suit with effect; and also on failure of the defendant, if convicted, to pay said costs.

Witness our hands and seals, this 4th day of October A. D. 1911.

ADA R. WRIGHT, [L. S.]
By McKINNEY BARTON, *Att'y.* [L. S.]
McKINNEY BARTON, *Surety.* [L. S.]

Approved and acknowledged before me, the fourth day of November A D. 1911.

——— ———, *Clerk.*
——— ———, *D. C.*

Marshal's Return.

This Writ came to hand on the date of its issuance, and I duly executed the same, as therein commanded, by making the contents thereof known to the within named defendant Y. & M. V. R. R. Co. by leaving copies with S. S. Morris, Gen. Supt. for said Co. at Memphis, Tennessee on the 6th day of November A. D. 1911 and

at the same time and place delivering to him a duly certified copy thereof.

J. SAM JOHNSON,
U. S. Marshal,
By ZACH JOLLY, *Deputy.*

I hereby accept service for Y. & M. V. R. R. Co.
S. S. MORRIS, *Gen. Supt.,*
By G. W. BIGGS, *Acting Chief Clerk.*

November 6, 1911.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Western District of Tennessee, Western Division.

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its November term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on, to-wit, the 4th day of November, A. D. 1911, in the following cause, to-wit:

No. 4151, C. C.

Mrs. ADA R. WRIGHT, Administratrix of D. C. Wright, Deceased,
vs.
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Order for Process, etc.

This day came the Plaintiff by his Attorneys and presents to the Court Declaration herein, together with bond for Cost and moves for leave to file and docket same and for the issuance of process thereof, which motion, for satisfactory reasons to the Court appearing, is granted and allowed;

It is therefore Ordered by the Court that said Declaration and Cost Bond be filed and entered upon the docket of this Court, and the Clerk is here directed to issue process with copies thereof and of said Declaration for service on the defendants therein named, returnable to the coming November term of this Court.

In the Circuit Court of the United States Western District of Tennessee, Western Division.

No. 4151.

Mrs. Ada R. Wright, Administratrix of D. C. Wright, Deceased, a Resident of Memphis, Tennessee,

vs.

Yazoo & Mississippi Valley Railroad Company, a Corporation Organized under the Laws of Mississippi.

Motion to Strike Plaintiff's Declaration from Files.

Filed November 29th, 1911. Dan. F. Elliotte, Clerk.

Now comes the defendant, the Yazoo & Mississippi Valley Railroad Company, and moves to strike the plaintiff's declaration from the file on the ground:

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I.

That in the plaintiff's declaration, the plaintiff alleges more than one distinct and separate ground of negligence and cause of action, in one and the same count.

II.

Because in the Plaintiff's declaration in one and in the same count the plaintiff alleges more than one, to-wit, eight separate and distinct acts of negligence and does not put in a separate count each specific and separate cause of action and negligence and on account of this duplicity this defendant moves to strike this plaintiff's declaration from the files.

FITZHUGH & BIGGS,
THOS. A. EVANS,
Attorneys for Defendants.

United States of America:

Circuit Court of the United States, Western District of Tennessee, Western Divison.

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its November term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on, to-wit, the 9th day of November, A. D. 1911, in the following cause, to-wit:

No. 4151.

Mrs. Ada R. Wright, Administratrix of D. C. Wright, Deceased, a Resident of Memphis, Tennessee.

vs.

Yazoo & Mississippi Valley Railroad Company, a Corporation Organized under the Laws of Mississippi.

Order Sustaining Demurrer, Leave to File, and Amended Declaration.

In this cause, came the plaintiff by attorney and it appearing on motion to the Court for satisfactory reasons that leave to amend the plaintiff's declaration filed in the above entitled cause should be granted, and the motion of the Y. & M. V. Railroad Company to strike said original declaration from the file having been heretofore sustained. It is therefore ordered by the Court that leave be granted the plaintiff to file an amended declaration in lieu of said original declaration to which, the motion of defendant to strike said original declaration from the file was sustained.

5 In the Circuit Court of the United States, Western District of Tennessee, Western Division.

No. 4151, C. C.

Mrs. Ada R. Wright, Administratrix of D. C. Wright, Deceased, a Resident of Memphis, Tennessee.

vs.

Yazoo & Mississippi Valley Railroad Company, a Corporation Organized under the Laws of Mississippi.

Amended Declaration.

Filed December 9th, 1911. Dan. F. Elliott, Clerk.

Plaintiff by attorney comes and sues the defendant for the sum of Fifty Thousand Dollars ($50,000) damages due her, and for cause of action shows as follows:

First Count.

Plaintiff alleges that she is the surviving widow of D. C. Wright, deceased, who died on the ninth day of May, 1911, at Yazoo City, in the State of Mississippi from injuries received while in the employment of the defendant railroad company, and while operating one of its trains as an engineer at or near Gwin, in the State of Mississippi on the ninth of May, 1911.

The said D. C. Wright died intestate, being at the time a citizen and resident of the state of Tennessee, and then living and resid-

ing in the city of Memphis, Shelby County, Tennessee. He left surviving him, the plaintiff as his widow and three children, Bernard, Rollin and Pauline Wright, who also live and reside with the plaintiff in Memphis, Tennessee.

The plaintiff was on the 20th day of May, 1911, appointed by the Probate Court of Shelby County, Tennessee, which had jurisdiction thereof, administratrix of said D. C. Wright and she qualified and gave bond as required by law and letters of administration were to her duly issued, which are here to the court shown and she has entered on the discharge of her duties as such administratrix, and she brings this suit as administratrix for her own benefit and for the benefit of her three children, above named, who were the only children of said D. C. Wright, deceased, who were living at his death.

Plaintiff further shows that the defendant railroad company, herein sued, is and was at the times hereinafter mentioned a corporation, chartered and organized under the laws of the state of Mississippi, owning and having tracks and lines of Railroad running from Memphis, Tennessee, in and through various parts and counties of Mississippi and was and is engaged in the railroad business as a common carrier of freight and passengers, and is as
6 such engaged in commerce between the states, and the plaintiff further avers that a part of one of the defendant railroad company's lines is in and runs through this, the county of Shelby, State of Tennessee, and the railroad company has depots and agencies in this county and state, although it is a non-resident corporation organized under the laws of Mississippi and having its headquarters in that state, and it has also a line of railroad located in Holmes County, in the State of Mississippi, which it owns and operates as aforesaid, where the accident and injuries hereinafter mentioned occurred, and the defendant is sued as such railroad corporation, engaged as a common carrier in inter-state commerce or commerce between the states, as a common carrier owning and operating said lines of railroad.

Plaintiff further shows that her intestate, the said D. C. Wright, was on or about the 8th or 9th day of May, 1911 employed by said defendant railroad company and engaged in and working for it as an engineer, and at the time of the accident and injuries hereinafter mentioned, said defendant company was as such common carrier, engaged in commerce between the states, and that the said D. C. Wright was then and there employed by the said defendant company in said inter-state commerce, and while so engaged and employed said D. C. Wright was called on and required by his superior officers, servants, and agents of said railroad company, in the discharge of his business and employment as an engineer, to take and run or operate an engine and train employed in the business of inter-state commerce from Memphis in the state of Tennessee to and through parts of the state of Mississippi, and over the lines of said defendant company, and among other points and lines, to and through a station on one of its said lines which is called and known as Gwin, located in the said state, in the County of Holmes,

and on the said 9th day of May, 1911 while so engaged and while at or near said station of Gwin and while in the prudent and careful discharge of his duties, and while running and operating said engine, belonging to said defendant company as an engineer, he was without fault on his part, seriously hit, bruised, cut, crushed, and injured, so that in a few hours thereafter, having been taken to Yazoo City, Mississippi, he died from the effects and as the results of said wounds and injuries.

The said deceased, operating said engine as stated, and while in the discharge of his duties as such an engineer, was approaching and entering the station yards at Gwin and while so doing a part
7 of the engine came in collision with and struck or was struck by a car or cars, which had been negligently left on the side track or switch in such a position as that they were not entirely in the clear, or had been left so that they moved or ran down to a point where they were not sufficiently in the clear so as the engine on which the deceased was riding could pass, and so that as the engine came up, a corner of one of said cars hit or struck and came in contact with or collision with said engine or a part thereof. As a result of the collision, parts of the engine and cars were torn off and parts of them hit or struck the said D. C. Wright, who without fault on his part, was thus cut, bruised, mangled and injured so that he died as aforesaid.

Said accident, collision and *and* injuries resulted from negligence of the said defendant carrier, its officers, agents and employees, other than the deceased D. C. Wright, and was due to the negligence of such employees of said defendant, a common carrier, and was also due to defects and insufficiency or negligence in its cars, engines and appliances, machinery, track, roadbed, works and equipment.

Plaintiff further avers that as the said deceased, D. C. Wright, approached said station and was moving on to the track he was required to occupy and pass over, that he in the prudent discharge of his duty, was seated on the right hand side of the engine, operating the same as an engineer, and approached said station, having his train, under prudent and reasonable control, and that the track which he was required to take was or appeared to be open and unoccupied, and that the cars, which were standing on a side track and which subsequently struck his engine did not when seen by him appear to be in a position to strike his train, and he, the said engineer, had a reasonable cause to believe that they were in the clear, but as he approached nearer said cars, it become impossible on account of his position on the engine, and the shape of the track, for him to see them, as the switch upon which they were, was on the left hand side of his engine and the cars on the switch were either left so or subsequently ran down so as to strike a part of the engine and the other servants, agents and employees of defendant, failed to warn deceased in time, for him to stop the train and avoid the collision, but as soon as the engineer was warned that the cars might not be in the clear, he put on the emergency brakes and did what he could to stop the engine, but was unable to do so in time to prevent the collision.

Plaintiff alleges that said accident was the result of the
8 negligence of the defendant company, its officers, servants and agents, and that among other things, they were negligent in the following particulars:

That the officers, agents, servants and employes, the yard master and other servants, and employes of the said company in charge of and operating in said station yards, at Gwin, were negligent in this,—that they placed said cars, which came in collision with the engine on which the deceased was riding, in such position as not to be entirely in the clear or in such condition and position as to run down to a point where they would not be entirely in the clear, but in a position so that this could not be seen in time to prevent an accident by those running and operating an approaching engine or train.

And plaintiff avers that by reason of said matters and things hereinabove set out, and said acts of negligence and wrong of omission and commission, said accident, and collision occurred, and was caused, and the plaintiff's intestate D. C. Wright without fault of negligence on his part was struck and injured as above stated, cut, bruised, crushed and mangled and that after living several hours and suffering untold pain and anguish, he finally died from said injuries, and that plaintiff, as his widow and her three children for whom she sues, lost and were deprived of their husband and father, on whom they were dependent, of his love, comfort and support, all to their great damage, to-wit, the sum of Fifty Thousand Dollars ($50,000) for which she sues as administratrix for the benefit of herself as widow and her children, and demands a jury to try the issues.

BARTON & BARTON,
Attorneys for Plaintiff.

Second Count.

Plaintiff sues the defendant for another and further Fifty Thousand Dollars ($50,000) for reason of the following facts, to-wit:

Plaintiff relying on the averments of the first count in this declaration as though fully set out herein *and* further alleges that said accident was the result of the negligence of the defendant company, its officers, servants and agents and that among other things they were negligent in the following particular:

Said yard master, the servants and agents of the defendant company in charge of and operating in the said yards were guilty of negligence in not seeing that said cars were placed and kept in a
9 position where they would be safe and clear from an engine or train approaching on the track on which the train of the deceased, or which he was operating, was running.

And plaintiff avers that by reason of said matters and things hereinabove set out, and said acts of negligence and wrong of omission and commission, said accident, and collision occurred, and was caused, and the plaintiff's intestate D. C. Wright without fault of negligence on his part was struck and injured as above stated, cut, bruised and crushed and mangled and that after living several

hours and suffering untold pain and anguish, he finally died from said injuries, and that plaintiff, as his widow and her three children for whom she sues, lost and were deprived of their husband and father, on whom they were dependent, of his love, comfort and support, all to their great damage, to-wit, the sum of Fifty Thousand Dollars ($50,000) for which she sues as administratrix for the benefit of herself as widow and her children, and demands a jury to try the issues.

BARTON & BARTON,
Attorneys for Plaintiff.

Third Count

Plaintiff sues the defendant for another and further Fifty Thousand Dollars ($50,000) for reason of the following facts, to-wit:

Plaintiff relying on the averments of the first count in this declaration as though fully set out herein *and* further alleges that said accident was the result of the negligence of the defendant company, its officers, servants and agents and that among other things they were negligent in the following particular:

Said servants and agents were guilty of negligence in not warning the deceased and those operating and running said train on which he was injured of the danger in approaching said cars.

And plaintiff avers that by reason of said matters and things hereinabove set out, and said acts of negligence and wrong of omission and commission, said accident, and collision occurred, and was caused, and the plaintiff's intestate D. C. Wright without fault of negligence on his part was struck and injured as above stated, cut, bruised, crushed and mangled and that after living several hours and suffering untold pain and anguish, he finally died from said injuries, and that plaintiff, as his widow and her three children for whom she sues, lost and were deprived of their husband and father, on whom they were dependent, of his love, comfort and support, all to their great damage, to-wit, the sum of Fifty Thousand Dollars ($50,000) for which she sues as administratrix for the benefit of herself as widow and her three children, and demands a jury to try the issues.

BARTON & BARTON,
Attorneys for Plaintiff

Fourth Count.

Plaintiff sues the defendant for another and further Fifty Thousand Dollars ($50,000) for reason of the following facts, to-wit:

Plaintiff relying on the averments of the first count in this declaration as though fully set out herein *and* further alleges that said accident was the result of the negligence of the defendant company, its officers, servants and agents and that among other things they were negligent in the following particular:

The defendant, its servants and agents, were guilty of negligence in not providing, establishing, promulgating and enforcing suit-

able rules and regulations for the running and operating of trains in said yards, and for keeping the tracks free and safe for approaching trains, and for failing to establish suitable bounds, signals, devices, etc.

And plaintiff avers that by reason of said matters and things hereinabove set out, and said acts of negligence and wrong of omission and commission, said accident, and collision occurred, and was caused, and the plaintiff's intestate D. C. Wright without fault of negligence on his part was struck and injured as above stated, cut, bruised, crushed and mangled and that after living several hours and suffering untold pain and anguish, he finally died from said injuries, and that plaintiff, as his widow and her three children for whom she sues, lost and were deprived of their husband and father, on whom they were dependent, of his love, comfort and support, all to their great damage, to-wit, the sum of Fifty Thousand Dollars ($50,000) for which she sues as administratrix for the benefit of herself as widow and her children, and demands a jury to try the issues.

BARTON & BARTON,
Attorneys for Plaintiff.

Fifth Count.

Plaintiff sues the defendant for another and further Fifty Thousand Dollars ($50,000) for reason of the following facts, to-wit:

Plaintiff relying on the averments of the first count in this declaration as though fully set out herein *and* further alleges
11 that said accident was the result of the negligence of the defendant company, its officers, servants and agents and that among other things they were negligent in the following particular:

The defendant, its servants and agents, were guilty of negligence in not furnishing said D. C. Wright, deceased, with a safe place to work and especially in not keeping the track over which he was required to pass and run his engine and train clear, safe and unobstructed, but permitting it to become unsafe and obstructed and in not keeping and maintaining suitable devices, signals, etc., to prevent such accidents, these constituting defects and insufficiency in its roads, tracks, etc.

And plaintiff avers that by reason of said matters and things hereinabove set out, and said acts of negligence and wrong of omission and commission, said accident, and collision occurred, and was caused, and the plaintiff's intestate D. C. Wright without fault of negligence on his part was struck and injured as above stated, cut, bruised and crushed and mangled and that after living several hours and suffering untold pain and anguish, he finally died from said injuries, and that plaintiff, as his widow and her three children for whom she sues, lost and were deprived of their husband and father, on whom they were dependent, of his love, comfort and support, all to their great damage, to-wit, the sum of Fifty Thousand Dollars ($50,000) for which she sues as administratrix for the bene-

fit of herself as widow and her children, and demands a jury to try the issues.

BARTON & BARTON,
Attorneys for Plaintiff.

Sixth Count.

Plaintiff sues the defendant for another and further Fifty Thousand Dollars ($50,000) for reason of the following facts, to-wit:

Plaintiff relying on the averments of the first count in this declaration as though fully set out herein *and* further alleges that said accident was the result of the negligence of the defendant company, its officers, servants and agents and that among other things they were negligent in the following particular:

The other servants, agents and employes were guilty of negligence in not giving said deceased an earlier warning so that he might have stopped the train sooner.

And plaintiff avers that by reason of said matters and things hereinabove set out, and said acts of negligence and wrong of omission and commission, said accident, and collision occurred,
12 and was caused, and the plaintiff's intestate D. C. Wright without fault of negligence on his part was struck and injured as above stated, cut, bruised and crushed and mangled and that after living several hours and suffering untold pain and anguish, he finally died from said injuries, and that plaintiff, as his widow and her three children for whom she sues, lost and were deprived of their husband and father, on whom they were dependent, of his love, comfort and support, all to their great damage, to-wit, the sum of Fifty Thousand Dollars ($50,000) for which she sues as administratrix for the benefit of herself as widow and her children, and demands a jury to try the issues.

BARTON & BARTON,
Attorneys for Plaintiff.

Seventh Count.

Plaintiff sues the defendant for another and further Fifty Thousand Dollars ($50,000) for reason of the following facts, to-wit:

Plaintiff relying on the averments of the first count in this declaration as though fully set out herein *and* further alleges that said accident was the result of the negligence of the defendant company, its officers, servants and agents and that among other things they were negligent in the following particular:

The defendant company was guilty of negligence in not having its engine and trains and cars properly equipped and provided with safety appliances required by the Act of Congress.

And plaintiff avers that by reason of said matters and things hereinabove set out, and said acts of negligence and wrong of omission and commission, said accident and collision occurred, and was caused, and the plaintiff's intestate D. C. Wright without fault of negligence on his part was struck and injured as above stated, cut

bruised and crushed and mangled and that after living several hours and suffering untold pain and anguish, he finally died from said injuries, and that plaintiff, as widow and her three children for whom she sues, lost and were deprived of their husband and father, on whom they were dependent, of his love, comfort and support, all to their great damage, to-wit, the sum of Fifty Thousand Dollars ($50,000) for which she sues as administratrix for the benefit of herself as widow and her children, and demands a jury to try the issues.

BARTON & BARTON,
Attorneys for Plaintiff.

13 Eighth Count.

Plaintiff sues the defendant for another and further Fifty Thousand Dollars ($50,000) for reason of the following facts, to-wit:

Plaintiff relying on the averments of the first count in this declaration as though fully set out herein *and* further alleges that said accident was the result of the negligence of the defendant company, its officers, servants and agents and that among other things they were negligent in the following particular:

The yard master, officers, servants and agents of the defendant company at Gwin, were guilty of gross negligence in that they wilfully and with gross negligence placed said cars so as to be an obstruction and to cause a collision.

And plaintiff avers that by reason of said matters and things hereinabove set out, and said acts of negligence and wrong of omission and commission, said accident, and collision occurred, and was caused, and the plaintiff's intestate D. C. Wright without fault of negligence on his part was struck and injured as above stated, cut, bruised and crushed and mangled and that after living several hours and suffering untold pain and anguish, he finally died from said injuries, and that plaintiff, as his widow and her three children for whom she sues, lost and were deprived of their husband and father, on whom they were dependent, of his love, comfort and support, all to their great damage, to-wit, the sum of Fifty Thousand Dollars ($50,000) for which she sues as administratrix for the benefit of herself as widow and her children, and demands a jury to try the issues.

BARTON & BARTON,
HOLMES,
Attorneys for Plaintiff.

In the Circuit Court of the United States, Western District of Tennessee, Western Division.

No. 4151, C. C.

Mrs. Ada Wright
vs.
Yazoo & Mississippi Valley Railroad Company.

Pleas for the Defendant.

Filed December 16th, 1911. Dan F. Elliotte, Clerk.

Now comes the defendant, the Yazoo & Mississippi Valley Railroad Company, and for plea to the amended declaration filed herein, and to each and every count thereof, says:

14 First. That it is not guilty of the matters and things therein alleged.

Second. For further plea it says that the plaintiff's intestate was guilty of contributory negligence, causing and proximately contributing to and resulting in the injuries complained of in the declaration as to bar a recovery herein.

Third. That the plaintiff's intestate was guilty of such contributory negligence as to proximately contribute to and cause the injuries for which this suit is brought.

FITZHUGH and BIGGS,
Attorneys for Defendant.

Plaintiff joins issue on all these pleas.

BARTON & BARTON, *Att'ys.*

Letters of Administration.

Filed January 22nd, 1912. A. G. Mathews, Clerk.

State of Tennessee,
Shelby County:

To Ada R. Wright, a citizen of said county:

It appearing to the Probate Court, now in session, that D. C. Wright has died, leaving no Will, and the Court being satisfied as to your claim to the administration, and you, having given bond and qualified as directed by law, and the Court having ordered that Letters of Administration be issued to you,

These are, therefore, to authorize and empower you to take into your possession and control, all the Goods, Chattels, Claims and papers of the said intestate, and return a true and perfect inventory thereof to our next Probate Court; to collect and pay all debts, and to do and transact all the duties in relation to said estate, which lawfully devolves on you as Administratrix and after having settled up

said estate, to deliver the residue thereof to those who are by law entitled.

Witness, Thomas B. Crenshaw, Clerk of said Court, at office, this 20th day of May, 1911, and the 135th year of American Independence.

T. B. CRENSHAW, *Clerk*,
By E. B. CRENSHAW, *D. C.*

[Seal of Probate Court.]

In the District Court of the United States, Western District of Tennessee, Western Division.

No. 4151, C. C.

Mrs. ADA R. WRIGHT, Administratrix,
vs.
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

15 *Pleas of Defendant.*

Filed January 22nd, 1912. A. G. Mathews, Clerk.

Comes the defendant, the Yazoo & Mississippi Valley Railroad Company, and for pleas to each and every count of the plaintiff's declaration says:

I.

That it is not guilty of the matters and things in the said declaration, and in each and every count thereof, alleged:

II.

For further plea the defendant says that the injuries and death of the plaintiff's intestate for which this suit is brought as declared on in each and every count of the declaration were due to the negligence and contributory negligence of the plaintiff's intestate.

III.

Comes the defendant, Yazoo & Mississippi Valley Railroad Company, and for plea to each and every count of the plaintiff's declaration says that the plaintiff is not entitled to recover, because injuries and death of the plaintiff's intestate were brought about by matters and things, the risk of which had been and were assumed by the plaintiff's intestate.

IV.

For further plea to each and every count of the declaration the defendant says that the plaintiff's intestate knew the danger of the matters and things alleged in the plaintiff's declaration, and in every

count thereof, and with knowledge assumed the risk, and that by reason of said assumption of risk the plaintiff is not entitled to recover.

FITZHUGH AND BIGGS,
Attorneys for Defendant.

UNITED STATES OF AMERICA:

District Court of the United States, Western District of Tennessee, Western Division.

In the District Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its November Term, A. D. 1911, at the United
16 States Court House in the City of Memphis, in said District, on to-wit: the 26th day of January, A. D. 1912, in the following cause, to-wit:

No. 4151, C. C.

Mrs. ADA R. WRIGHT, Administratrix of D. C. Wright, Deceased,
vs.
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Order, Jury Impaneled, Trial Begun, and Respite.

This day came the plaintiff with her attorney, and the defendant with its attorney, and also a jury of good and lawful men, to-wit: J. G. Lacost, D. A. Freeman, L. R. Shelton, John Cole, G. R. Myers, Oscar Christie, A. D. McLean, Geo. P. Markham, F. T. Cupples, J. B. Wright and Henry Bowden and R. Garnett, who being duly elected impaneled tried and sworn well and truly to try the issues herein joined and a true verdict render according to the law and the evidence, when the trial of this case was begun and there not being sufficient time to complete the same today the further hearing of same is hereby postponed until tomorrow.

UNITED STATES OF AMERICA:

District Court of the United States, Western District of Tennessee, Western Division.

In the District Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its November Term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on to-wit: the 27th day of January, A. D. 1912, in the Following Cause to-wit:

No. 4151, C. C.

Mrs. Ada R. Wright, Administratrix,
vs.
Yazoo & Mississippi Valley Railroad Co.

Order on Verdict of Jury, $19,000.00 and Costs.

Again came the said plaintiff with her attorneys and said defendants by its attorneys; came again also the jury heretofore impaneled and sworn herein, when the trial of this case was again resumed, and the jury having heard the testimony, listened to the argument of counsel and received the charge of the Court, upon thir oaths do say, they find the issues herein joined to be in favor of the said plaintiff and against the said defendant; that they assess the amount of plaintiff's damages and recovery against the defendant at the sum of Nineteen Thousand ($19,000.00) Dollars to which defendant excepted.

17 On motion of the plaintiff, it is therefore hereby considered by the Court that the said plaintiff, Ada R. Wright, administratrix, do have and recover of and from the said defendant, the Yazoo & Mississippi Valley Railroad Company, said sum of Nineteen Thousand ($19,000) Dollars and the costs of this suit, for the collection of which said sum and costs, execution is hereby awarded, to which the defendant duly excepted.

In the District Court of the United States, Western District of Tennessee, Western Division.

No. 4151, C. C.

Mrs. Ada R. Wright, Administratrix of D. C. Wright, Deceased,
vs.
Yazoo & Mississippi Valley Railroad Co.

Notice of Motion for New Trial.

Filed February 1, 1912. A. G. Mathews, Clerk.

To Mrs. Ada R. Wright, Administratrix of D. C. Wright, deceased, or Barton & Barton, or Holmes & Holmes, her attorneys of record:

Please take notice that on Saturday, February 10, 1912, the defendant will move the court to set aside the verdict and grant them a new trial in the above case, such motion to be heard on that date, or such other time as may be fixed by the court.

This February 1, 1912.

FITZHUGH & BIGGS,
Attorneys for Defendants.

We acknowledge service of the above notice, and carbon copy thereof which was left with us.

BARTON & BARTON,
Attorneys for Plaintiff.

We hereby certify that a copy of the foregoing notice was served on Barton & Barton, attorneys for the plaintiff, this — day of February, 1912.

——— ———,
——— ———,
Attorneys for Defendant.

UNITED STATES OF AMERICA:

District Court of the United States, Western District of Tennessee, Western Division.

In the District Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its November Term, A. D. 1911, at the United
18 States Court House in the City of Memphis, in said District, on to-wit: the 8th day of March, A. D. 1912, in the following cause, to-wit:

No. 4151, C. C.

MRS. ADA R. WRIGHT, Administratrix,
vs.
YAZOO & MISSISSIPPI VALLEY RAILROAD CO.

Order Entering Plaintiff's Remittitur of $9,000.00 and Overruling and Disallowing a New Trial.

This cause came on to be heard on the motion of defendant for a new trial, which motion being heard and considered by the court, the Court is of the opinion that all of the grounds set forth in said motion, except the twenty-fourth ground, based upon the fact that the verdict was excessive, are not well taken and are overruled by the Court.

The Court is further of the opinion that the twenty-fourth assignment of error is well taken to the extent that the verdict as returned is excessive. It is thereupon considered by the court that unless the plaintiff herein shall enter a remittitur for the nine thousand ($9,000.00) dollars that the motion for a new trial will be granted upon the above ground. Thereupon came the plaintiff into Court by her attorneys of record, Barton and Barton and J. E. Holmes, and entered a remittitur for nine thousand ($9,000.00) dollars.

Thereupon the Court was pleased to overrule the motion for a new trial.

It is thereupon considered by the Court that the judgment heretofore entered in this cause, as of date the 27th day of January, 1912, against the Yazoo & Mississippi Valley Railroad Company, the defendant, for nineteen thousand ($19,000.00) dollars be, and the same hereby is set aside.

And it is further considered by the Court that the plaintiff, Mrs. Ada R. Wright, administratrix of D. C. Wright, deceased, have and recover of the defendant, the Yazoo & Mississippi Valley Railroad Company, the sum of ten thousand ($10,000.00) dollars, as of date the 27th of January, 1912, together with all of the costs of this cause, for which execution is awarded.

To the action of the Court in overruling its action for a new trial the defendant, the Yazoo & Mississippi Valley Railroad Company, duly and regularly entered its exception of record, and the Court is pleased to allow the said defendant twenty (20) days from this date within which to make and file its bill of exceptions.

19 UNITED STATES OF AMERICA:

District Court of the United States, Western District of Tennessee, Western Division.

In the District Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its November Term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on to-wit: the 16th day of March, A. D. 1912, in the Following Cause, to-wit:

No. 4151, C. C.

Mrs. ADA R. WRIGHT, Administratrix of D. C. Wright, Deceased,
vs.
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Order Making Bill of Exceptions Part of Record.

This day came the defendant, the Yazoo & Mississippi Valley Railroad Company, by its attorneys of record, herein, and presented to the Court its Bill of Exceptions.

Being examined by the court and found to be correct, the same is signed and sealed by the court, and upon the motion of the defendant to have the same made a part of the record in this cause, it is ordered by the Court that said Bill of Exceptions be filed in this cause, and be made a part of the record herein.

In the District Court of the United States for the Western Division of the Western District of Tennessee.

No. —.

Mrs. Ada R. Wright, Administratrix Estate of D. C. Wright, Dec'd, Plaintiff.

vs.

Yazoo & Mississippi Valley Railroad Co., Defendant.

Bill of Exceptions.

Filed March 16th, 1912. A. G. Mathews, Clerk.

Be it remembered, that the above styled case was called for trial and tried on the 26th day of January, 1912, before the Honorable John E. McCall, Judge of said Court, and a jury, duly selected, impaneled and sworn, in the Court room of said Court, in Memphis, Tennessee, when and where the following proceedings were had, to-wit:

Appearances:

For Plaintiff, Messrs. Barton & Barton and Mr. Holmes.
For Defendant, Mr. Albert W. Biggs.

20 Before the jury was impaneled and sworn, the following occurred:

Judge Barton: If the Court please, there is a preliminary matter in the case we would like to have disposed of. Pleas were filed in the case on the 4th of December, I believe it was. This case was set for hearing on the 22nd, and additional pleas, the same exactly as the original pleas, except that there was an additional plea of assumption of risk, which we think is pleading the law, and is made under the general issue. These pleas were filed without notice, and without leave of the Court, and we move to strike out those pleas. They cover exactly the same grounds as the original pleas, with the exception mentioned.

The Court: What do you say, Mr. Biggs?

Mr. Biggs: At the time I filed the pleas, I did not find any copies of the pleas which had been filed, and therefore I sent these over. If it is necessary to make an application, I would like to file the additional plea of assumption of risk.

The Court: All right.

Mr. Biggs: Judge Barton says it is covered by the general issue. If it is, it will do no harm to file it as a separate plea.

The Court: Let the plea of assumption of risk be filed, and the others stricken out.

Mr. McKinney Barton: Your Honor allows the second pleas to be filed and the first ones stricken out.

The Court: Yes.

Judge BARTON: We reserve an exception to the action of the Court in allowing to be filed the plea of assumption of risk.

The COURT: Your exception goes to the action of the Court in permitting counsel to file the plea of assumption of risk this morning.

Judge BARTON: Yes, sir.

The jury was thereupon impaneled and sworn, and the trial of the case before the Court and jury was begun, as follows:

Counsel for the parties stated the case to the Court and jury as follows:

Statement of Case for Plaintiff.

Mr. MCKINNEY BARTON: If your Honor please, and you, gentlemen of the jury, this is a damage suit brought by Mrs. Ada Wright, as administratrix of her husband, D. C. Wright, deceased, growing out of the negligent killing of her husband. Her husband was an engineer on the Yazoo & Mississippi Valley
21 Railroad, and his run was between Memphis and Tchula, Mississippi. He had a freight train on May 8th, 1911, and left Memphis on that run, and, while going into the yards at Tchula, Mississippi, which is something over two hundred miles below here, and in running into the yards there, he ran into a coal car which had been negligently left so that it would not clear the track upon which it was to go into the yard; he didn't see that coal car—didn't see that it was not in the clear on account of being on a curve, and its being on the opposite side of the engine from which he was sitting, from which he performed his duties; that he ran into that car, and his fireman didn't notify him in time to stop the train before it was hit, and the fireman jumped off, and that he attempted to get off after he was warned that it was too close to pass, and that the engine struck the coal car and he was caught in the wreck and mashed nearly in two, and he died in about an hour afterwards.

Now we expect to show you that his death was occasioned by the negligence of the yard crew there in leaving that car, coal car, so that it would not clear; that it was against the positive rules of the Company, and that it was negligence in itself to allow it to be there, and we also expect to show you that the fireman was negligent in not warning the engineer in time to have stopped the train; that the engineer was guilty of no negligence whatever. We expect to show you that he was a man about forty-one years of age, and in perfect health, and had a life expectancy of about twenty-seven and a half years; that his earning capacity averaged eighteen hundred dollars a year, and we ask at your hands a judgment that would compensate his widow and her minor children for the death of her husband.

Statement of Case for Defendant.

Mr. BIGGS: May it please your Honor, and you, gentlemen of the jury, the Railroad Company has filed pleas to the declaration in which it states, in substance, that it is not guilty of the matters and things of which the plaintiff complains. I do not mean by that to say, gentlemen of the jury, that Mr. Wright was not injured, or did not die as the result of the collision of his engine with a coal car, or was struck by the car, or some car in the yards of the Company at Gwin, Mississippi, but what I mean to say is, that the Railroad Company was guilty of no negligence which brought about Mr. Wright's death. We hope that the proof will develop to you, gentlemen, that Mr. Wright, who was an experienced engineer I mean, who was well acquainted with the duties, as well as
22 with the perils of railroading, had been in the employment of this Company for some time as a railroad engineer: that he took his engine and cars into the yards at Gwin, Mississippi, and that as an experienced railroad man he knew the condition in which those yards were, and that his injury and death brought about by one of these risks of railroading which, by his employment with the Company, and of which he had knowledge, he assumed.

We further expect the proof to show that, if there was any negligence whatever by any servant of the Y. & M. V. Railroad Company, it was the negligence of Mr. Wright himself, and that he alone is responsible for his own injury and death, and that, therefore, the Railroad Company is not liable to the plaintiff in any sum whatsoever.

Judge BARTON: I think we neglected to state that at the time of this accident, this train and the deceased were engaged in handling interstate commerce. That is not disputed, is it?

Mr. MCKINNEY BARTON: I stated that. I stated that he was going from one state to another.

The COURT: Go ahead. Mr. Biggs, you stated that you had a plea of not guilty. I don't know what other plea you have—assumption of risk?

Mr. BIGGS: Yes, sir, and contributory negligence.

The COURT: All right. Call your first witness.

The parties thereon, in support of the respective issues, introduced evidence as follows:

Plaintiff's Proof.

The Plaintiff, Mrs. Ada Wright, in support of the issues, on her part, introduced the following evidence:

Mrs. ADA R. WRIGHT, the plaintiff, the first witness, being first duly sworn, testified in her own behalf, as follows:

Direct examination for plaintiff.

By Judge BARTON:

Q. Now, Mrs. Wright, face the jury and talk so they can all hear what you have to say. What is your full name, Mrs. Wright?

A. Ada R. Wright.
Q. Where do you live?
A. In Memphis.
Q. How long have you lived in Memphis?
A. Seven years.
Q. Where did you live before coming here, Mrs. Wright.
A. Iowa.
23 Q. What was your husband's name?
A. Douglas C. Wright.
Q. Is he dead?
A. He is dead.
Q. What was the cause of his death?
A. Accident.

Mr. BIGGS: If you know, Mrs. Wright. You were not present.
Mr. BARTON: Yes, if you know. I understand counsel in his opening statement, to admit that he was killed in an accident there, or I would not have put it that way.
Mr. BIGGS: Well, I don't want you to prove by her anything that she don't know.

Q. Are you the administratrix of Mr. D. C. Wright?
A. Yes, I am.

Mr. BIGGS: You need not prove that.
Judge BARTON: Well, that is admitted. The letters of administration are here.

Q. When were you married to Mr. Wright?
A. 1890.
Q. How many children have you, Mrs. Wright?
A. Three.
Q. What are their names and ages? What is the name of the oldest?
A. Bernard H. Wright.
Q. How old is he?
A. Twenty.
Q. How old?
A. Twenty years.
Q. What is the name of the second child?
A. Robin T. Wright.
Q. How old is he?
A. Seventeen.
Q. What is the name of the third?
A. Pauline Wright.
Q. Pauline Wright, the little girl?
A. Yes, sir.
Q. How old is she?
A. Twelve years old.

(By Mr. BIGGS:)

Q. Three children?
A. Yes, sir.

Judge BARTON: Yes, aged twenty years, seventeen years and twelve years.

Q. How old was your husband at the time of his death?
A. Forty-one. He was in his forty-second year.
Q. What was the state and condition of his health at the time of his death?
24 A. Very good.
Q. What was the general condition of his health all his life, at least, while you knew him, Mrs. Wright?
A. Very good.
Q. Had he always been healthy?
A. Yes, sir.
Q. About what height man was he, Mr. Wright; how high was he?
A. About five feet eleven,—ten or eleven.
Q. Five feet, ten?
A. Five feet, ten or eleven.
Q. About how much did he weigh?
A. About one hundred and ninety pounds.
Q. About 190 pounds?
A. Yes, sir.
Q. Had he ever had any serious sickness?
A. No.
Q. Did he have any physical defect of any kind?
A. No.
Q. Had none?
A. No.
Q. How long had your husband been in the railroad business?
A. About seventeen years.
Q. About 17 years?
A. Yes, sir.
Q. What part of that time had he been a railroad or locomotive engineer?
A. Twelve years.
Q. Twelve years?
A. Yes, sir.
Q. Mrs. Wright, state, if you know, what was his character and standing as an engineer? Was he regarded as a skillful and competent—I believe you stated that to the jury.

Mr. BIGGS: She stated that he was an experienced railroad man.

A. I should say, excellent.
Q. He had a good reputation?
A. Yes.
Q. What was his character generally for prudence and caution; was he, or not, a prudent and cautious man?
A. He was.
Q. Mrs. Wright, what was the character and habits of your husband in regard to the use of intoxicants; was he temperate, or intemperate? Did he drink?

A. He was temperate.
25 Q. Always temperate?
A. Yes, sir.

Q. State the fact in regard to whether, or not, he was kept steadily at work; did he work steadily, or only occasionally?

A. He worked steadily.

Q. Constantly employed in his vocation?

A. Yes he was.

Q. When off of service, where did he spend his time; at home or elsewhere?

Mr. BIGGS: Don't lead the witness, Judge.

Q. Well, where did he spend his time?

The COURT: I think the question is hardly a leading one, Mr. Biggs.

Q. Where did he spend his time?

A. At home.

Q. At home?

A. Yes, sir.

Q. What was his disposition and manner of life toward his family? To make it a little more definite, if I can, without leading——

The COURT (interrupting): I think she ought to understand that.

A. He was kind.

Q. And considerate?

Mr. BIGGS: I assume all of that is true.

The COURT: I think so, myself.

Mr. BIGGS: I don't think there is any neecssity for proving that Mr. Wright was a kind man.

The COURT: I don't see that that need be proven. There has been no assault on the man. The law presumes he was a good man, of good reputation and good habits.

Judge BARTON: The only reason I asked that, if your Honor please, I have a case just decided by the Supreme Court of the United States, in which it was held that the disposition of a man towards his family was competent—whether he was devoted and kind—it was held that that was competent to prove in a case of this kind. That was not expressly held in the opinion of the Supreme Court, but objections were made to that matter of evidence, and the Supreme Court overruled the objection. That was the only reason I wanted to go into that line of questions.

The COURT: Go ahead.

Q. Mrs. Wright, what were his habits with reference to economy? was he extravagant. What did he do with his wages?

Mr. BIGGS:

Q. I object——

26 A. (In unison.) He spent it on his family.

Mr. BIGGS (continuing): To what he did with his wages.

Q. Was he a good provider for his family?

Mr. BIGGS: I object to that.

The COURT: Go ahead.

Judge BARTON: If he objects, I don't want any question made about it, if your Honor please.

Q. Now, Mrs. Wright, if you know, and state how you know, what was the earning capacity, average earning capacity, of your husband at the time of his death? About how much did he usually make, a month?

A. About $150.00.

Q. Did he sometimes make more than that?

A. Yes.

Q. About how high did his wages run?

A. To $180 or $185.

Q. You have seen his salary checks?

A. I did.

Q. Mrs. Wright, when did you first learn of your husband's death?

A. About four o'clock in the afternoon of May 8th.

Q. 8th of May?

A. Yes, sir.

Q. How did you learn that?

A. I was told by a woman——

The COURT (interrupting): How is that material?

Q. Did you go to him then?

Mr. BIGGS: I object to that, your Honor. That is wholly incompetent.

Judge BARTON: I withdraw that.

The COURT: I can't see the materiality of it.

Judge BARTON: Just recitation—I wanted to show that she went down there.

Q. Was he dead when you got there?

A. Yes, sir.

Q. You don't know anything about—you didn't see his body, and you don't know anything about the nature and character of his injuries, I believe?

A. No.

Q. Well, before—immediately preceding the time he was killed, when was the last time you saw him?

A. In the morning——

Q. (interrupting): Morning of the day that he was killed?

A. Yes sir, of the 8th.

Q. He left Memphis then to go on that run?

27 A. Yes.

Q. Do you know what the run was?

A. No, I do not .

Q. You don't know where the train was bound to after leaving Memphis, to go somewhere in Mississippi?

The COURT: As I understood Mr. Biggs, there is no question

about the accident having occurred, and that he lost his life at the place you allege.

Judge BARTON: Yes sir, but it is important to show that he left the State of Tennessee, but we can prove by other witnesses that he was handling interstate commerce.

The COURT: This lady doesn't know what train he went on. Go ahead.

Judge BARTON: You may cross-examine.

Cross-examination for defendant.

By Mr. BIGGS:

Q. Mrs. Wright, how long had your husband been employed——

Judge BARTON (interrupting): Just one moment. There is one matter I wanted to identify unless you gentlemen will admit it.

Mr. BIGGS: You had better identify it.

(Judge BARTON:)

Q. I here hand you a book of rules of the Transportation Department—that is, of the Illinois Central Railroad rules of the Transportation department. (Passing to witness.) I will ask *as* you whether that is the book that your husband had at the time of his death?

A. Yes, it is.

Q. That is the book he used, as an engineer?

A. Yes.

Q. How long had your husband been engaged in the railroad service?

A. About seventeen years.

Q. About 17 years?

A. Yes, sir.

Q. Was he first a fireman on a locomotive?

A. Yes.

Q. And then he was a locomotive engineer?

A. Yes, sir.

Q. How long had he been a locomotive engineer?

A. About twelve years.

Q. What railroad companies had he been employed by?

A. The Illinois Central and the Des Moines, Fort Dodge & Northern.

Q. He was employed first by the Des Moines, Fort Dodge & Northern Railroad Company?

A. No, sir.

28 Q. First, by the Illinois Central?

A. Yes, sir.

Q. And then by the Des Moines, Fort Dodge & Northern?

A. Yes, sir.

Q. And then by the Y. & M. V.?

A. Yes, sir.

Q. How long had he been employed by the Yazoo & Mississippi Valley Railroad?

A. Seven years.
Q. Had he been running out of Memphis during that time?
A. Yes.
Q. Engaged in the freight service all the time, was he, or was he in the yard service part of the time?
A. Freight service?
Q. Freight service?
A. Yes.
Q. You know the difference between a yard engineer and a road engineer?
A. Yes, sir.
Q. Was he a road engineer all of that time?
A. Yes, all of that time.
Q. All of that time?
A. Yes.
Q. He was originally employed for part of the time by the Illinois Central as yard engineer, of course?
(No response.)
Q. At one time he was a yard engineer, wasn't he?
A. Why, he was a switch engineer for a while up north.
Q. Switch engineer?
A. Yes.
Q. That is the same as a yard engineer. At what place was he employed as a switch engineer?
A. At Waterloo, Iowa.
Q. At Waterloo, Iowa, for the Illinois Central Railroad?
A. Yes, sir.
Q. Do you know what his run had been after he came to Memphis—from Memphis south, had it been, on the Y. & M. V.?
A. Yes sir, always south.
Q. Always South. Did he go to Gwin, or Tchula, as it is sometimes called?
A. He went to Gwin.
Q. He went to Gwin?
A. Yes.
29 Q. He made that trip frequently, didn't he?
A. Very frequently.
Q. Very frequently?
A. Yes, sir.
Q. About two or three times a week? About how many runs?
A. Not always to Gwin. Sometimes, it was to other points.
Q. To other points?
A. I should say, about three trips, a week.
Q. About three trips, a week?
A. Yes.

Mr. BIGGS: You may stand aside, Mrs. Wright.
Mr. MCKINNEY BARTON: Come around here, Mrs. Wright.

Witness Excused.

Judge BARTON: If your Honor please, I might state that Mr. Biggs has agreed that we need not introduce any proof on the ex-

pectancy of life of Mr. Wright, and that the mortality tables, saying that his age is forty-one, the mortality tables will show his expectation of life as twenty-seven and a half years.

Mr. BIGGS: You have the mortality tables here, have you?

Judge BARTON: Yes, sir.

Mr. BIGGS: What mortality table is that?

Mr. MCKINNEY BARTON: Twenty-seven and a half.

Mr. BIGGS: By which rule is that?

Mr. MCKINNEY BARTON: The rule we always use in the Circuit Court.

Mr. BIGGS: There are two tables, the American mortality tables and the Carlile, and then the Northingham.

The COURT: They are practically the same, aren't they?

Mr. BIGGS: Some difference.

The COURT: What tables are you relying on? What figures?

Judge BARTON: Twenty-seven and a half years.

The COURT: By what table?

Mr. MCKINNEY BARTON: Carlyle table.

The COURT: Carlyle table.

Mr. C. W. JOHNSON was then called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct examination for plaintiff.

By Judge BARTON:

Q. What is your name?

A. C. W. Johnson.

Q. Where do you live?

30 A. Birmingham, Alabama.

Q. Birmingham, Alabama?

A. Yes, sir.

Q. Where were you born?

A. Carrolton, Mississippi.

Q. Where were you raised?

A. Carrolton, Mississippi.

Q. You are at present living in Birmingham, Alabama?

A. Yes, sir.

Q. Did you know D. C. Wright, Mr. Johnson?

A. Yes, sir.

Q. How long have you known him?

A. Well, I had known him from December, 1910, to May, 1911.

Q. What is your business?

A. Locomotive fireman.

Q. By whom were you employed at the time of the death of Mr. Wright?

A. Y. & M. V. Railroad.

(By the COURT:)

Q. You say you had known him from December, 1910 to May, 1911?

A. Yes, sir.

Q. Were you on the engine at the time of the accident which resulted in his death?

A. Yes, sir.

Q. Where did that train which that engine was pulling—where was that train made up, and where did it go from—first state the date of that accident about as near as you can recall it?

A. I believe it was May 8th, 1911.

Q. Now, where was that train made up, Mr. Johnson?

A. At Nonconnah yards, here at Memphis.

Q. Memphis, Tennessee?

A. Yes, sir.

Q. What did the train consist of?

A. Coal.

Q. How many cars were in that train, if you know, when you left Memphis?

A. I don't remember how many cars we did have.

Q. About how many?

A. We had somewhere between twelve and twenty, as near as I can come at it—if I make no mistake. We had a very light train, anyway.

Q. Where was that train destined to? Where were you to go? What was your run that day?

A. Gwin, Mississippi.

Q. Gwin, Mississippi?

A. Yes.

Q. Had you reached Gwin at the time of the accident?

31 A. Yes sir, we was in the yards.

Q. Had you dropped any cars on the way?

A. Yes, sir.

Q. Had you picked up any?

A. No, sir.

Q. Now, Mr. Johnson I want you to just tell the Court and jury about that accident, and how it occurred. First, tell the jury about where it occurred—what place?

A. Gwin, Miss.

(By the COURT:)

Q. Now, go ahead and tell what occurred.

—. ——.

Q. Now, was it in the yards at Gwin?

A. Yes, sir.

Q. Had you entered the yards at the time the accident occurred?

A. Yes, sir.

Q. Well, what track was that train running on at that time?

A. What they call on the lead, the main lead.

(By the COURT:)

Q. Is that the main track?

A. No sir, the main lead of the yards.

The COURT: All right.

Q. Now, after you came in on the lead track, had the train slowed up, or not?

A. Yes, sir.

Q. For what purpose?

A. For the flagman to line the switch up,—to close the switch.

Q. Had the steam been shut off of the train?

A. Yes, sir.

Mr. BIGGS: Don't lead him, Judge.

The COURT: No, don't lead him.

Q. Well, just go ahead and tell the jury, in your own way, where the train was, and about where this accident occurred and how it occurred, as near as you can tell?

A. Well, the only thing was, there was some cars that were not clear, and this engineer asked me how everything was around there, if it was in the clear, and I looked out to see if it was, and I said "all right," and he opened the engine up and went a short ways, and shut off again, and he asked me if some cars was clear over there. He asked me that, and I couldn't tell whether they were clear, or not, and we got right on them before I thought they wouldn't clear—lacked only four to eight or ten inches of clearing—(hesitating).

The COURT: Well, go ahead.

The WITNESS: When he asked me if they would clear, I couldn't tell whether they would or not. I thought all the time they
32 would, and was still looking at them all the time. I hollered then that they wouldn't clear, and I said "Get off", and I jumped off of the engine, and the next I saw of him, he was caught between the tank and engine—and the cab. The corner of the car slashed the cab on my side, and he got caught in between the tank and the cab, and up under the truck of the lead car—the first truck of the head car behind the engine. I drug him out from under there, with his hand, I believe, broken——

Mr. BIGGS (interrupting): I can't hear you.

The COURT: Go ahead — that again. You found him under the truck of the front car, and what?

The WITNESS: With his hand broken off—his right hand, right at the wrist, and two leaders holding. He was trying to turn over and couldn't. I helped him from under there, and then I went to try to take care of the engine. The blowoff cock was open, and I was trying to get that shut off, to keep from burning the engine.

(By the COURT:)

Q. Were the cars that he struck on your side?

A. Yes, sir.

Q. On the fireman's side?

A. Yes, sir.

(By the COURT:)

Q. Were you running around a curve?

A. The track is very straight right there where it is but not nowhere from there it is curved.

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Wright, admr
p. 3 v a

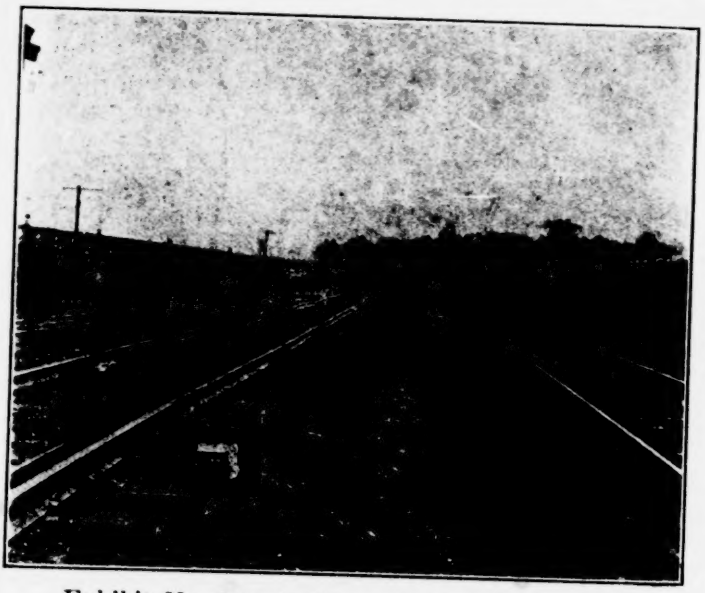

Exhibit No. 1 to testimony of C. W. Johnson.

(By the COURT:)

Q. How great a distance could you see the cars on the track that were struck from your place on the engine?

A. Well, I suppose I could have seen the cars four or five car lengths, but I couldn't tell whether they were clear, or not.

Q. Now, Mr. Johnson, I want to show you a photograph, which I mark exhibit No. 1, taken of the premises down there, and I want to ask you if that is a good representation of the premises from the standpoint from which that appears to be taken? (Submitting kodak picture to witness.)

A. Yes, sir.

Mr. BIGGS: I want to see that, Judge, before you——

Mr. MCKINNEY BARTON: You have seen that one.

Mr. BIGGS: All right. I have seen it.

The COURT: Go ahead.

Q. Now, Mr. Johnson, I want to ask you on what track that train was running—just a short time before you hit the car?

A. This one right here (indicating on picture).

Q. That is on the right hand track as shown in that picture, is it?

(Here follows photograph marked p. 32*a*.)

33 A. Yes, sir.

Judge BARTON: This, gentlemen of the jury, you will have before you, and it is marked exhibit No. 1, and the track on which this engineer and this man were running was this right hand track.

The COURT: Mark "A"—I mean on the track that you say they were—put an "A" right in between the tracks, so they can see it.

Judge BARTON: Track "A" (marking as suggested by the Court), just before striking the car.

The WITNESS: Yes, sir.

Q. Now, what kind of a car was that that the engine ran against. Speak out so the jury can hear you.

A. An empty coal gondola.

Q. Empty coal gondola?

A. Yes, sir.

The COURT: Coal gondola.

Judge BARTON: Coal car.

(By the COURT:)

Q. Is that an iron car?

A. Yes sir, I think it was. I don't remember.

Q. Coal car?

A. Yes, sir.

Q. On what track was that coal car located?

A. Scale track.

Q. Now, Mark that "B."

The COURT: Yes, mark that "B."

Q. Now, in the photograph, is there a scale shown up there on the side of that track?

A. How is that?

Q. There is a scale shown in that picture on the side of that track, isn't there?

A. Yes, sir.

Q. That was known as the scale track?

A. Yes, sir.

Q. And that was the track on which the coal car that you struck was standing?

A. Yes, sir.

The COURT: Go ahead, Judge Barton.

Q. Do you remember the number of that engine?

A. Yes, sir.

Q. What was it?

A. 495.

Q. Well, what was the nature—construction of that engine in regard to the boiler?

A. It was——

Q. (Interrupting.) In respect to the cab; was it high up, or low, or what?

34 A. Well, it was more on a low——

Mr. BIGGS: I didn't catch that.

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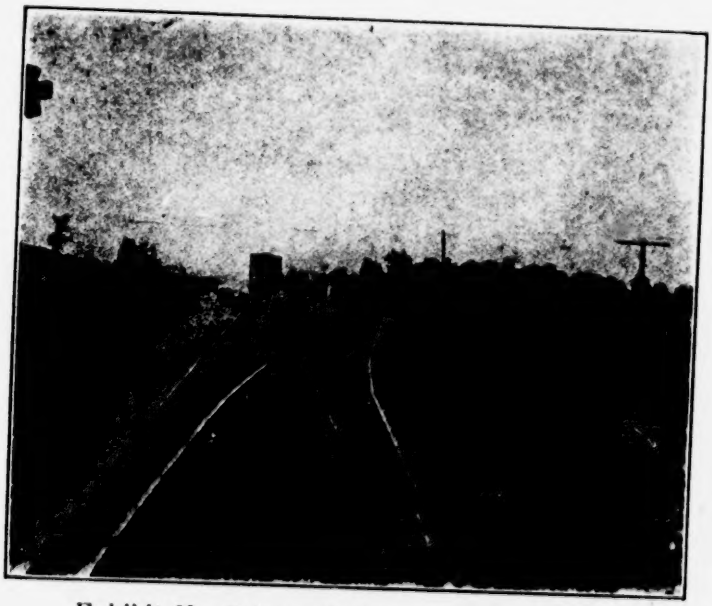

Exhibit No. 2 to testimony of C. W. Johnson.

The WITNESS: Low.
Q. The boiler was low, or high?
A. Well, they are a small engine, in other words.

(By the COURT:)

Q. What class?
A. 400 class.

(By Mr. BIGGS:)

Q. 400 class?
A. Yes, sir.

The COURT: Well, that will fix it. Proceed, Judge Barton.

Q. Now, I show you another photograph, taken a little nearer up, Mr. Johnson, and I mark that exhibit No. 2. (Submitting another photograph to witness.) I will ask you of that is a fair representation, about, of the premises there?
A. Yes, sir.
Q. Well, does the lead track——
Mr. BIGGS (interrupting): Don't lead him, please, Judge, on the lead track.
Judge BARTON: I want to ask him——
The COURT: Ask him which the lead track was.
Judge BARTON: He has shown the lead track is the track marked "A" on the right hand.
The COURT: He said that was the track he was on.

Judge BARTON: Now, I want to ask him whether that track runs straight ahead, or whether it turns in any way, and if it turns, in what direction it turns.
The WITNESS: Turns to the right.
Q. Turns to the right going south?
Mr. BIGGS: What track turns to the right?
The WITNESS: The main lead—not where the cars was hit, but the track below—north of where the cars was hit.
Q. Now, Mr. Johnson, where was it, with regard to this switch shown there—about how far back was it when the engineer first asked you whether, or not, everything was right on your side?
A. Well, about three or four car lengths.
Q. Three or four car lengths?
A. Four or five car lengths, I mean to say, where he asked me if everything was all right.
Q. State whether, or not, at that point, the lead track on which you were running, was curved to the right.

Mr. BIGGS: Well, I object to that question.
The COURT: Yes, that is leading. State what curve, and if so, how.
Judge BARTON: I want to ask him at that point.

(Here follows photograph marked p. 34*a*.)

35 The COURT: State if at that point it curved, and if so, what direction?

Judge BARTON: Yes, state that.

The WITNESS: Well, it was about as—well, the track curve it is not a curve but only where the switches leave it.

The COURT: If the track was straight, of course, a switch leading out from it would be curved,—would make a curve. Do you mean there is a crook in the main lead?

A. No, not in the main lead.

(By the COURT:)

Q. The main lead was practically straight where it happened, but the injunction of the side track that leads off the spur makes a curve—deflects from the straight line of the lead, doesn't it?

A. Yes.

(By the COURT:)

Q. Makes a turn?

A. Yes, sir.

(By the COURT:)

Q .In making a junction?

A. Yes, sir.

The COURT: Go ahead, Judge Barton.

Q. What time in the day did this accident occur?

A. It was at three-twenty or three-thirty, I disremember which.

Q. What direction was the train going at the time?

A. South.

Q. North?

A. South.

Q. Where was the sun, with reference to the engine at that time?

A. Kinder in the southwest.

Q. In the southwest?

A. Yes, sir.

Q. I mean, at the time the engineer asked you whether everything was all right over there; state to the jury whether, from the location of the engineer, where he was—whether he himself could see at that time——

Mr. BIGGS: I don't—don't answer that question well, go ahead, and ask the question.

The COURT: Go ahead and ask the question.

Q. Whether he himself could see whether the car which you eventually struck was in the clear? State whether he could see that?

A. No sir, he couldn't.

Mr. BIGGS: Hold on. I told you not to answer. I object to that, your Honor, on several grounds. It may be one of the questions for the jury to determine. This witness can testify as to the con-

36 dition of the track, and how far back it was that the man made the inquiry. He has testified they had a small engine.

Now, then, if the- were on a straight track, or a crooked track, it is a question for the jury to determine whether, or not, that man, where he was, could, or could not have seen. And further, this man is not shown to have been in the place where the engineer was.

The COURT: That would go only to the question of the contributory negligence of the deceased.

Mr. BIGGS: It might go to some other question, your Honor.

The COURT: Well, let him describe the distance back there, and the relation of that engine—the projection of the engine before the engineer, and let the jury determine whether, or not, the man could have seen.

Judge BARTON: The question is for the jury to determine, but it seems to me it is a competent question to ask. I can stand here and know I can't see outside of that door.

The COURT: If you prove that you were standing there, and a wall between you. The jury would readily understand that as well as anybody else; needn't prove that. Just show the situation there, Judge.

Q. Well, was, or was not, at that point where he spoke to you an obstruction which would prevent him from seeing——

Mr. BIGGS (interrupting): That is the same question.

The COURT: Yes, he may state that, if -here was any obstruction there to prevent him from seeing.

Q. State where the engineer was at the time he spoke to you?

A. On the right hand side of the engine in the cab.

(By the COURT:)

Q. In the engineer's seat?

A. No, sir, he was standing up.

(By the COURT:)

Q. In front of his seat?

A. Well, the seat was knocked down. They are a deckless engine.

(By the COURT:)

Q. Would he have had to step back?

A. The seat is arranged so you can knock it down and lock it over, and you can put a prop under.

Q. If he folded it up and put a prop under it, could he sit down?

A. Yes, sir.

(By the COURT:)

Q. Just bend his knees and sit down?

A. Yes, sir.

Q. He was standing there in his own place?

A. Yes, sir.

37 Q. What I want to know is, at the time he first asked you if everything was all right on your side, taking into consideration the conditions that existed at that time, whether the engineer could see—anybody standing there could see this car over there?

The COURT: I held that he couldn't answer that question. You asked him if there was any obstruction.

Q. What was the obstruction? If there was an obstruction, what was it?

A. Well, the sun, for one thing, was shining in his face, and the front of the engine would have prevented him from seeing it, to some extent.

Judge BARTON: Well, that's the point.
The COURT: Go ahead.

Q. How high was this gondola car off the ground?
A. I don't know exactly how high. It must have been somewhere about eight or ten feet, may be.
Q. Well——

The COURT: To the top of it, you mean?
The WITNESS: To the top of it, yes, sir.

Q. Well, now, when you—at the time he first asked you if everything was all right on your side——

Mr. BIGGS (interrupting): Now, I hate for Judge Barton to keep going over that time and again——
The COURT: Note your exception. Go ahead, Judge Barton.
Mr. BIGGS: And his leading way of asking the questions.
The COURT: Go ahead, Judge Barton. Note your exception.
Mr. BIGGS: I note an exception.

Q. At the time he first asked you if everything was all right on your side—I am trying to fix the special point to place and time—what did you say—where were you standing; what were you doing at that time?

A. I had just got up from putting in the fire and got up on my seat in the cab.

Q. You had just got up from putting fire in and got up on your seat in the cab?
A. Yes, sir.

Mr. BIGGS: I object to his repeating the answer.
The COURT: Judge, don't repeat. Just go ahead.

Q. What did you say, in reply to his question when he first asked you if everything was all right?

Mr. BIGGS: He has been over all of that.
The COURT: Let him state that one more time.

A. I told him everything was all right.
38 Q. How long was it then until he spoke to you again about it?
A. Well, about three or four cars' lengths.
Q. Then what did he say?
A. I didn't make no reply. I couldn't tell.
Q. What did he ask you that second time?
A. He asked me if those cars were clear over there.
Q. You say you didn't at once reply?

A. No sir, I did not.
Q. Why did you not?
A. Because I couldn't tell; they looked like they would clear, but didn't look like they would clear.
Q. How long was it until you did reply—about how far had you run?
A. Well, we had gone somewhere between one and two car lengths, or not quite so far.
Q. And then you told him——

Mr. BIGGS: I object to——
The COURT: Let him state what he told him.
Mr. BIGGS (continuing): —to his leading.

Q. What did you tell him?
A. I told him they would not clear, to get off.
Q. Now, if you had answered at once——

Mr. BIGGS (interrupting): Well,—if——
Judge BARTON: You don't know what I am going to ask.
Mr. BIGGS: Don't answer his question, now.

Q. If you had answered at once and told him that the cars were not in the clear, could he have stopped the engine in time to have prevented the accident?

Mr. BIGGS: I object to that, your Honor.
The COURT: Let him state, if he knows.

A. Well, according to the way he stopped afterwards, he could, yes, sir.
Q. What speed was the train going at the time when he first asked you about it?
A. Between three and four miles an hour, I suppose.
Q. What speed was the train going when the train struck the cars—just about the time?
A. Well, about the same speed, between three and four miles an hour.
Q. Now, what did the engineer do when you told him, no, to get off?
A. Why, he applied the emergency brake.
Q. What did he then do?
A. I don't know. I got off of the engine, and the next time I saw him, he was caught between the tank and the cab on my side
39 of the engine, and was dragged out by the car—the corner of it.
Q. He had come over from his side to your side?
A. Yes, sir.
Q. How long did you say you had known Mr. Wright?
A. About six months.

(By the COURT:)

Q. Up to the time of his death?
A. Yes, sir.

Q. What was his character and standing for caution and prudence?

A. They were good.

Mr. BIGGS: I object to that your Honor. He has to prove first that he knows.

Q. Now, Mr. Johnson——

The COURT (interrupting): There is an objection made to this man's answer as to the man's reputation for prudence and caution, on the ground that the man had not qualified. It comes rather late though.

Q. Well, do you know his character for prudence and skill?

The COURT: Do you think you know his character for prudence and skill?

A. Yes, sir.

(By the COURT:)

Q. State whether it was good, or bad?

A. It was good.

Q. Now, Mr. Johnson, I want to ask you what the custom was, in reference to engineers, or this engineer anyway, asking firemen, when they were going in on switches, about whether, or not, things would clear on his side?

Mr. BIGGS: Wait a minute. I object to that, your Honor.

The COURT: That is a question of whether he acted prudently and carefully. You can show what he did. I think that is sufficient.

Judge BARTON: It will be argued, of course—I am pretty certain Mr. Biggs will argue that the mere fact that they have a rule, that an engineer is expected to exercise caution and prudence—that they have a rule when an obstruction appears on the track, it is the duty of the engineer to slow up, and if necessary to stop the train and prevent an accident, and they will argue that because the engineer asked these questions, that he saw the danger. I want to show that it was customary—I want to ask whether it was customary for the engineer to appeal to the fireman——

The COURT (interrupting): I don't think that is competent. He may state what he did do.

Judge BARTON: We reserve exception to the ruling of your Honor.

Q. What were the rules about the tracks you should take, Mr. Johnson?

A. How is that?

Q. What were the yard rules in reference to the tracks you should take going in?

A. Well, we always get a signal from the yard master or some of the switchmen.

Q. You had a signal to come down that track?

A. Well, no, sir. That is what we do go by though and look out for.

Q. What did you mean by saying you had gotten a signal?

A. How is that?
Q. I thought you said you had a signal?
A. We had a signal from the rear end of the train to pull on up.
Q. Is that the track your train always came in on or took? Was that the track?
A. Yes, sir, without——
Q. That is the track?
A. Yes, sir.

(By Mr. McKinney Barton:)

Q. Without what?
A. Without being notified at the north yard switch.
Q. Were you notified to take any other track?
A. No, sir.
Q. Now, Mr. Johnson, this road you were on—employed by and that Mr. Wright was on at the time of this accident, was what road?
A. Y. & M. V.

(By the Court:)

Q. Yazoo & Mississippi Valley Railroad?
A. Yes, sir.
Q. Now, I will ask you what rules—I hand you this book (Passing book to witness); state whether that book of rules was used on that road?
A. Yes, sir, it was.
Q. I want to ask you this: after you entered that switch state whether, or not, the engineer shut off the steam, and rolled along?

Mr. Biggs: I object to that, your Honor.

Q. State whether he shut off the steam?

Mr. Biggs: I say, that is leading, as all of his questions have been.

The Court: Ask him what he did.

Q. What did he do after shutting off the steam?
41 A. He shut the engine off and rolled in, and came very near to a stop—to a stop for the flagman to get off and close the switch and catch the caboose again.
Q. What did he do then?
A. He opened the throttle and worked steam a little ways and then shut off again while I was putting in the fire.

The Court: Now, this witness has stated that once before.

Q. Now, Mr. Johnson, what part of the engine did this coal car strike?
A. It first struck the pilot sill, and then come back and struck the cab.
Q. Now, Mr. Johnson, how far was the engine from this coal car that was struck the second time Mr. Wright spoke to you, and when he asked you whether that car was in the clear; about how far from it, to the best of your judgment?
A. About the length of a car and——

Q. (Interrupting.) The length of a car?
A. Between one and two car lengths.

The COURT: Was that the last time?
Judge BARTON: Yes, sir.
The COURT: He stated that before.
Judge BARTON: I didn't think he did, the other time.
The COURT: Yes, he stated that before.

Q. How long was the car, about?
A. How long was the car?
Q. Yes?
A. I don't know.
Q. Well, about how many feet was that?
A. They range, about thirty-four and forty feet, I think.
Q. You have state- that the first thing struck on the engine was the pilot beam. Now, what was the next thing the car struck?
A. The steam chest.
Q. Now, where did it strike it?
A. Well, it tore the covering off of the steam chest, and broke it, I believe, and come on back, and struck the running board, where the running board widens out even with the outside edge of the cab, and struck there next and opened the blow-off cock.
Q. What?

The COURT: The blow-off cock.

A. Struck the running board of the cab, and tore the blow-off cock open.
42 Q. What was the result of that?
A. Well, tore the side of the cab away on my side.
Q. I mean, as to the escape of steam and so on?
A. Well, the steam blowing back under the engine—I mean, under the tank, and going back under the second and third cars.
Q. When you went to Mr. Wright, did you have any difficulty in getting him out?
A. No, sir, only he was a little heavy to handle.
Q. Was the steam pouring in on him?
A. Yes, sir to some extent it was.
Q. Now, Mr. Johnson, how much did that coal car lack of being in the clear? In other words, how much would it have to have been over on the—over on the east side of the——

The COURT: The spur track.
Judge BARTON: Yes, the spur track?

A. On the scale track you mean?
Q. Yes, on the scale track?
A. Well, I believe, between four and ten inches would clear it.
Q. The engine was hit on the east side of your track, was it? It was going south?
A. Yes, sir.
Q. And hit on the east side?
A. Yes, sir.

Q. Now, if it had been somewhere—it would have taken between four and ten inches to clear and not strike it at all?
A. Yes, sir.

The COURT: Go ahead, Mr. Barton, we are getting along mighty slow.
Judge BARTON: Yes, sir.

Q. Well, do you know what injuries—you speak of his hand being cut loose. Do you know what other injuries were inflicted on him?
A. Well, I know some others. He had—it seemed like that he had no use of his right side or leg at all—none whatever, and I heard him complain something about his right leg, and he had some bruises on his head, and his right hand cut off—only two leaders, I believe, holding that hand.

The COURT: Well, the man was killed there, wasn't he, by the injury?
Mr. KINNEY BARTON: He died later. He was unconscious and died.
Judge BARTON: You may cross-examine.

43 Cross-examination for defendant by Mr. BIGGS:

Q. Your name is Johnson?
A. Yes, sir.
Q. How long were you in the service of the Y. & M. V. Railroad?
A. About eight months, or a little better.
Q. What is your present occupation?
A. Why, I am unemployed right at this time. That is all I follow, though, firing a locomotive.
Q. What did you say?
A. I am unemployed. I say, that is all I follow, though, is locomotive fireman.
Q. When did you get out of employment—some months ago?
A. No, sir. The second of this month.
Q. What railroad were you working for when you were let out of the service?
A. The Frisco.
Q. What railroad did you work for after leaving the Frisco Railroad?
A. None at all.
Q. Do you live in Birmingham, Alabama?
A. Yes, sir, that is my home.
Q. When did you come here?
A. Last December, a year ago.
Q. I mean, when you came here for this trial?
A. Why, I have been laying around Memphis here since about the 5th of this month.
Q. Did you come over for the purpose of testifying in this case?
A. Well, yes, sir.
Q. At whose instance?

A. What?

Q. At whose instance did you come about the 12th for the purpose of giving testimony in this case?

A. Well, Mrs. Wright asked me to stay here. Mr. Barton, rather, asked me to stay here for the trial.

Q. You have been examined on the rules of railroads, haven't you?

A. Yes, sir.

Q. You were examined before you were employed by the Y. & M. V.?

A. Yes, sir.

Q. You were examined on a book of rules something like you had there, in size?

A. Yes, sir.

44 Q. You know that the Y. & M. V. Railroad had its own book of rules, don't you?

A. Well, my understanding is, that is the only book of rules I ever saw a copy of on the Y. & M. V., was the Illinois Central book of rules.

Q. Did you ever see a book of rules with the name Yazoo & Mississippi Railroad Company on it?

A. Not until—I forget the month that new book came out.

Q. I am not talking about the new book. That was since the accident. Did you ever see the old book of rules of the Y. & M. V. Railroad?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Both railroads have since issued a new book of rules?

A. Yes, sir.

Q. And you have seen the printed book of rules of the Y. & M. V. Railroad?

A. Yes, sir; the new book, understand.

Q. Do I understand you to say that the Y. & M. V. never issued a book of rules, or that you never saw the book of rules?

A. I say I never saw one?

Q. You never saw the book of rules?

A. No, sir.

Q. Now, as I understand, you had already entered the yard, the railroad yards, at Gwin, Mississippi?

A. Yes, sir.

Q. Do you think you would be able to recognize a plat of those yards if you were to see it, the various lead tracks and switch tracks, sufficient to show the track on which you were hurt—on which Mr. Right was hurt?

A. I believe I can, yes, sir.

A large plat, the length of the jury box, was placed on the floor, in front of the jury, which is made Exhibit No. 100 to Bill of Exceptions and so marked.

EXHIBIT No. 100.

Original Large Plat transmitted by agreement of Counsel, Page 2 of this transcript.

Q. Now, Mr. Johnson, assuming that that represents the yards of the Company at Gwin, and that this is north, in this direction?
A. Yes, sir.
Q. Then your train entered from what direction?
A. From the north.
45 Q. So, it came in this direction, moving in the direction of that pencil?
A. Yes, sir.
Q. Now, then, what are these two tracks here, at what we will call the bottom of the map, these two tracks that go off that way?
A. One of those is the main line.
Q. Main line?
A. The outside one is the main line.
Q. The outside one is the main line, and the next one is used as a main line in the yards—north and south bound mains in these yards?
A. Yes, sir.
Q. In other words, this track is used as a main line for trains——
A. (Interrupting.) No, sir.
Q. Well, what is this other track—just a siding, then?
A. That is what they call—I don't know whether that is the passing tracks, or what it is, but anyway, it goes up to the yard office, up to the cut-off up there.
Q. Runs entirely through the length of the yards—these two tracks, plumb to the south end?
A. I don't know very much about the south end.
Q. You don't know much about the south end of the yards?
A. No, sir.
Q. Now, then, when your train came in on this main track, in order to leave that main line, there is a switch there, isn't there?
A. Yes, sir.
Q. Did your fore brakeman have to throw that switch?
A. Head brakeman?
Q. The head brakeman threw that switch?
A. Yes, sir.
Q. Which I will mark A, on this map, the first one, No. 1, I will put it. Then you come on till there is another switch (indicating on map?)
A. Yes, sir.
Q. Was it necessary to throw that switch?
A. No, sir, it was not.
Q. So, after passing there, you come along until you reach the second switch at that point? (Marking it "2.")
A. Yes, sir.
Q. Now, what did you do at that place?

A. That goes—that is the round house lead there, I believe?
Q. The round house lead?
46 A. Yes, sir.
Q. How was that set; for, or against you?
A. Well, I don't remember stopping for it; if we stopped for it, I don't remember it.
Q. Then, does my pencil represent the movement of your train?
A. Yes, sir.
Q. Is that the track on which it moved?
A. Yes, sir.
Q. You had passed by the round house lead?
A. Yes, sir.
Q. There was a switch there, was there?
A. Yes, sir.

Mr. Biggs: Mr. Evans, will you put the figure 3 right there.

Q. That was the third switch that you had passed after entering the yards?
A. Yes, sir.
Q. You spoke of closing a switch. Was this the switch that was closed behind you?
A. Yes, sir, the main line switch.
Q. The main line switch?
A. Yes, sir.
Q. Well, passing on down the same line, you passed another switch, which leads off here, into what kind of a track is that—storage track?
A. I don't remember what that track was.

Mr. Biggs: You may mark that switch No. 4.

Q. Was that switch interferred with by your train, or crew?
A. No, sir.
Q. Coming on down here, moving like that pencil—that was the track it moved on, was it?
A. Yes, sir.
Q. Until you get to the fifth switch (marking it "5"). What did you do at that place?
A. Well—what did we do at that place?
Q. Was that switch set for, or against you?
A. Set for us.
Q. Set for you?
A. On around the lead.
Q. Your train then turned slightly to the right, didn't it—the track there?
A. Yes, sir, that switch.
Q. Then you left this track on which you were moving, and turned to the right, and then you came to another switch there, marked "6," that led off into what track?
47 A. Scale track.
Q. Scale track?
A. Yes, sir.

Q. And the scale track comes down here, and has on it the word "Scale"—is that where the scales would show on this map—can you see it from there?

A. Yes, sir. I don't remember just the distance from the switch down to the scales.

Q. Now, it was on that track that this coal car was situated, was it?

A. Yes, sir.

Q. And your train was moving along that outside track there?

A. Yes, sir.

Q. Which is—that would be what direction—south?

A. That is what we call south.

Q. Southwest—sort of in a southwest direction?

A. Yes, sir.

Q. What time of the year was it that this accident happened?

A. It was May 8th, I believe.

Q. What time of day was it?

A. About three-twenty or three-thirty. I don't remember the minute.

Q. What kind of a day was it—clear and bright?

A. Yes, sir.

Q. Clear and bright day?

A. Yes, sir.

Q. Well, now, as I understand it, the coal cars were on this scale track?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. And they protruded too close to the track on which your train was running?

A. Yes, sir.

Q. And, in passing by these coal cars, they struck the left hand side of your engine?

A. Yes sir.

Q. Which is the engineer's side of the engine?

A. Well, he is on the right hand side of the engine.

Q. And which is the fireman's side?

A. Left hand side.

Q. Now, about where were you when you say the engineer first asked you if he could clear? Had you passed that fourth switch then?

48 A. When the engineer first asked me if these coal cars we hit would clear?

Q. Yes.

A. Why, we were about a car length and a half, or two car lengths, from the scale track.

A. When he first asked me, I suppose, when he asked me how everything was up there in the yard, we were somewhere about four or five cars lengths from the switch.

Q. Four of five car lengths from that scale track up there. How

far were you when—what did he ask you, about this first lead track here?

A. He asked me if everything was all right up there.

Q. And were there any cars on that track?

A. I don't remember, if there was.

Q. Were there generally cars on that track?

A. Well, cars around through the yards all the time. A man won't take any special notice of cars standing around on the tracks, not concerning him.

Q. The yards at Gwin was the place where the trains are broken up from Memphis division, and what is known as the Louisiana Division, isn't it?

A. Yes, sir.

Q. And all freight trains moving by what is known as the Valley route to New Orleans, passed through the Gwin yards; that is, a great many trains go that way?

A. Yes, sir.

Q. And these Gwin yards themselves are very busy yards—great many trains in and out of them—freight trains?

A. Well, at times there was, yes sir.

Q. Well, how was it in May; good many trains at that time moving?

A. Well, yes sir.

Q. Good many trains moving?

A. Business was fairly good at that time.

Q. So, as a matter of fact, nearly every freight track there was occupied with cars; it was no common thing to see all the tracks occupied?

A. No sir.

Q. Did you, or not, say the engineer asked you about the first track, whether it was occupied, or did he ask you if everything was all right in the yards?

A. That's the way I taken the words—how is everything around there, and I says, all right.

Q. All right.

A. That was the answer I gave him.

By the COURT:)

Q. Had you passed that point?

49 Mr. BRIGGS: Fourth point.

The COURT (continuing question): When you said everything was all right?

A. Well, right about that.

Q. Right about that point where your first lead goes off?

The COURT: What spur was running into your line that he asked you about, when he asked you if everything was all right?

The WITNESS: What was he——?

The COURT: To what did he refer?

The WITNESS: He meant, how was everything up through the yards,—what did they say up there.

Q. What did they say.

A. That's what he meant—if I got a signal—if everything looked to be in the clear, and if it was, I would say it was all right.

Q. I understand that you never did get a signal from up in the yards as to what track to occupy?

A. No sir.

Q. You simply had a signal from the caboose end?

A. Yes sir.

Q. And that meant that the flagman had got out and closed the switch No. 1, and had gotten on the caboose?

A. Yes sir.

Q. That was all that meant?

A. That was all that was.

Q. You testified that nobody signalled you to take the track you did take.

A. That was the rule.

Q. I know, but you had no signal?

A. No.

(By the COURT:)

Q. Is that the track you would have taken, without a signal?

A. Yes, sir.

(By the COURT:)

Q. And if you had been given a signal, you would have been controlled by the signal?

A. Yes, sir.

Q. You received no advice whatever?

A. No sir.

Q. When did you begin to put coal in the engine?

A. Well, just about—well, just as he opened up after he pulled in the switch.

Q. Well, he had but twelve cars—you had twelve loaded cars—coal cars?

50 A. I don't remember the number of the cars; seemed liked there was about twelve.

Q. Seemed like there was about twelve. How long did it take to put the coal in—three or four minutes?

A. I only put in three or four scoops—never took no time hardly.

Q. Well, it took some time—you have to open up the fire place?

A. Yes sir, but that is a short job.

Q. But you have to do it?

A. Yes, sir.

Q. Your engine was not equipped with automatic air pressure that opens and closes the doors for you, like they have on some of the passenger engines?

A. No sir.

Q. You had to open and close the doors?

A. Yes, sir.

Q. And you threw in several scoops full of coal?

A. Yes sir, three or four.

Q. You threw in the coal after he asked you if everything was all right in the yards?

A. No, sir, before. He shut off while I was putting in my fire. He had just opened up the engine, and I was standing in the gangway waiting for him to open her up so I could put my fire in, and get up and look out and get the signal.

Q. Didn't you testify a while ago that you were putting in coal after he shut off the engine and started up again, and that was when you threw in the coal, after it started?

A. After he had shut off to come in the switch—after he had shut off for the flagman to close the switch was when I put my coal in.

Q. Didn't he ask you before he started up—before you started, if you got any signal? Wasn't that when you got the signal?

A. No sir.

Q. That was not the time.

A. No sir.

Q. Then, when he asked you if everything was all right was after you had thrown in the coal and gotten back in your stand?

A. Yes, sir.

Q. He was standing up, wasn't he?

A. Yes, sir.

Q. He was then preparing to get off of his engine, was he not?

51 A. No sir.

Q. Hadn't he washed already and pulled——

A. He had——

Q. (Interrupting.) Pulled off his shirt?

A. He had taken his overclothes off at Wyatt, I believe, is the first passing track.

Q. First passing track out of Gwin?

A. Yes, sir.

Q. What was he doing at that time?

A. At the time he was washing?

Q. At the time he asked you the first time if everything was clear?

A. Why, he was handling the engine.

Q. He was handling the engine?

A. Yes, sir.

Q. How far were you from that scale track—how far were you from this first track, this track No. 4, that leads around there that comes up on your side, when he asked you the second time?

A. How far from the scale track?

Q. Now, how far from the track before you got to the scale track?

A. Well, I don't know the distance between the two switches.

Q. What?

A. I don't know the distance between the two switches.

Q. Well, had you passed that track?

A. Passed which track?

Q. The track which runs off here, storage track from switch No. 4—the place marked "4," along past the leads that go up into the roundhouse?

A. We had passed the roundhouse leads, yes sir.

Q. Had you passed the second switch from the roundhouse lead, when he asked you?

A. I don't know—had he passed the second switch when he asked me the second time?

Q. Yes?

A. Yes, sir.

Q. Sure of that?

A. Yes, sir.

Q. How far were you from this switch—the switch is on this side of the cars—how far were you from that switch leading into the scale track—I mean, before you got to the scale track—before you got to the scale track, there is another switch that leads off on your side there?

A. Yes, sir.

Q. What did he ask you about that switch?

52 A. I don't remember him saying anything about that switch at all. In fact, no switches were mentioned.

Q. You were not talking about—when you said, all right, you were not talking about the cars on the scale track?

A. I was talking about all the way around.

Q. You were talking about all the way around. Now, when he asked you the second time, what did he ask you?

A. He says, "Will those cars clear there on the scale track?"

Q. "Will those cars clear there on the scale track?"

A. Yes, sir.

Q. And what did you say?

A. I didn't make any reply at all until we were right on them. I thought all the time that they was near enough in the clear that we could go by.

Q. Did he ask you again before you answered?

A. No, sir.

Q. Didn't you testify that he asked you the third time?

A. No sir.

Q. You didn't testify that?

A. No, sir.

Q. Then he only asked you twice?

A. Yes, sir.

Q. How long was it after he asked you the question, before you answered it?

A. Well, I don't know, in just minutes, or seconds, but it was only just a short time.

Q. How far had your train run in that time?

A. About a car length.

Q. About a car length?

A. About a car length and a half, or something like that.

Q. How far were you from those cars when he asked you again?

A. Between one and two car lengths.

The COURT: He has stated that four or five times.

Mr. BIGGS: Yes sir, on the original examination.

Q. And then you say you run a car length or two car lengths before you answered?

A. I say a car length and a half.

Q. Car length and a half.

A. Yes, sir.

Q. Didn't you testify on your original examination that you were a car and a half's length from it when he asked you the second time?

The COURT: That is what he testifies now.

53 Mr. BIGGS: No. He says two car lengths.

The COURT: He has given an estimate all the time.

Mr. BIGGS: All right. I just wanted to find out.

The COURT: All right, I know, but we are going over that so much.

Q. Can you give the jury some estimate, in time, between when he asked you that question, and when you answered it?

A. Well, we were going at the rate of between three and four miles, an hour, I will say or perhaps, three miles an hour.

Q. And he had between one and two car lengths to go before he struck the cars?

A. We was almost on the cars when I saw they wouldn't clear. I thought perhaps they might scrape my side of the cab, and perhaps roll them down, and when I saw they wouldn't clear, I hollered to him, "No, they won't clear; get off" and I jumped off of the engine myself.

Q. You jumped off the engine?

A. Yes, sir.

Q. Do you know what he did, after you hollered?

A. No sir,—yes sir, he applied the emergency brake.

Q. Applied the emergency brake?

A. Yes, sir, when I hollered.

Q. And then he evidently walked from where he was, from his side of the cab, to your side of the cab?

A. I don't know how he got over there, whether he walked or ran or jumped, but he was there.

Q. He was there. Now, if he had stayed around in his side of the cab after he applied the emergency, he wouldn't have been hurt, would he?

A. I couldn't say whether he would, or not.

Q. Was that side of the engine struck at all?

A. No, sir.

Q. It was not?

A. No, sir.

Q. So, he walked from his own side of the engine, or ran from over there, or jumped from over there, to the place from which you had jumped, after he applied his emergency?

A. Yes, sir.

Q. And that was the place that he was caught between the trains—between the cab and the boiler of the engine,—between the cab and the tank, or what we sometimes call the tender?

A. Yes, sir.

54 Q. He got on your side where you were accustomed to ride?

A. Yes, sir.

Mr. BIGGS: Take the witness.

Redirect examination for Plaintiff.

By Judge BARTON:

Q. Was any part of the cab torn up? To what extent was the cab torn up?

Mr. BIGGS: You asked whether, or not, if he had stayed on his own side, he would have been hurt.

A. Well, the glass were pretty well broken out all over the cab,—I believe were broken out. Perhaps——

Q. (Interrupting.) You can't tell whether he would have been hurt, or not, if he had stayed on that side?

A. No, sir.

Mr. BIGGS: I object to that question as leading.

The COURT: Go ahead.

Q. What was the natural and proper side, under the circumstance, for the engineer to try to get out on?

A. Well, my side would have been the proper side for him to have got off on.

Q. Why?

A. Because, he didn't know but what something was shoving the cars down on us, and if it had been that way, the engine couldn't have helped being turned over on his side.

Q. Was that the safe side for him to get off on?

A. Yes, sir.

Mr. BIGGS: If your honor please, I ask that be excluded from the jury, on the ground that, if something had been shoving cars down on him, when, as a matter of fact, the proof already shows that what the engineer was talking to this man about, was whether, or not, that side of the engine would clear those cars.

The COURT: I think the question is not very material here—what a man done in the excitement at the moment of an accident; he can't stop to think—to consider.

Mr. BIGGS: Well, I note an exception.

The COURT: Yes.

Recross-examination for plaintiff.

By Mr. BIGGS:

Q. Now, Mr. Johnson, was there any other thing there that was unusual, except just the striking of those cars; that was the only thing unusual there was, wasn't it?

A. That was all that I saw.

Q. That was all that you saw?

A. Yes, sir.

55 Q. And that is what the engineer was asking you about?

A. Yes sir, right then.

Q. And that is what you told him—that you would not clear?
A. After we was about right on them, I told him we wouldn't and to get off of the engine.
Q. To get off of the engine.
A. Yes, sir.

Mr. BIGGS: That's all.

Witness excused.

Judge BARTON: Mr. Biggs, I suppose, if we want to read anything that is pertinent from these rules, we may do so.
Mr. BIGGS: I don't want that whole book to go in. You had point out what you want to read.
The COURT: That is exactly what he is proposing to do, Mr. Biggs.
Mr. BIGGS: Your Honor, I don't understand——
The COURT: Are you willing for him to read such as he wants to read?
Mr. BIGGS: I would like for him to point them out before he closes his proof.
Judge Barton here furnished the Counsel a written statement of the Rules relied on.

Mr. BERNARD WRIGHT, a witness for the plaintiff, was then duly sworn, and testified as follows:

Direct examination for plaintiff.

By Mr. MCKINNEY BARTON:

Q. Your name is Bernard Wright?
A. Yes, sir.
Q. You are a son of D. C. Wright?
A. Yes, sir.
Q. And Mrs. Ada Wright?
A. Yes, sir.
The COURT: Speak out a little louder.
Q. How old are you, Mr. Wright?
A. Twenty years old.
Q. Your father, D. C. Wright, was employed by what Railroad?
The COURT: You needn't prove that. There is no question about that at all. Get down to what you want to prove by this young man.
Q. Do you know what book of rules the Y. & M. V. employees used; whether, or not, they used the book of rules used by the Illinois Central Railroad?
56 A. I couldn't say.
Q. You couldn't say as to that?
A. No, sir.
Q. What was the size of your father?

The COURT: How is that important as to what his size was?
Mr. BIGGS: He has been into all of that, your Honor.

The COURT: The proof shows that he was a man of large stature.

Q. Mr. Wright, I hand you these pictures. Do you know whether these pictures represent the conditions——

Mr. BIGGS: You have already proved them by another witness.

Q. (Passing pictures to witness.) I will ask you whether or not you took those pictures of that scene at Gwin, Mississippi?
A. Yes, sir.
Q. If so, when?
A. Why, I believe it was Sunday following the accident.
Q. Do they represent the true views and situation down there?
A. Yes, sir.
Mr. BARTON: That's all.

Mr. BIGGS: Stand aside.

Witness excused.

Mr. MCKINNEY BARTON: If your honor please, we now wish to introduce the deposition of the physician.

Mr. Barton thereupon read in evidence in behalf of the plaintiff, the deposition of Dr. H. P. TURNIPSEED, the same being as follows:

In the Circuit Court of the United States, Western District of Tennessee, Western Division.

N. 4151, C. C.

MRS. ADA R. WRIGHT, Administratrix of D. C. Wright, Deceased, a Resident of Memphis, Tennessee,

v.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, a Corporation Organized under the Laws of Mississippi.

Deposition of Doctor H. W. Turnipseed, to be Taken at Tchula, Mississippi, on Interrogatories and Cross-Interrogatories on Behalf of Plaintiff.

Filed December 16th. Dan F. Elliotte, Clerk.

It is agreed by attorneys for plaintiff and defendant that these interrogatories and cross-interrogatories may be sent to the
57 said Dr. H. W. Turnipseed at Tchula, Mississippi, the questions and cross questions by him were answered and thereupon taken before a Notary Public, sworn to, and the deposition signed and returned by the said Notary Public to the Clerk of the Circuit Court of the United States for the Western Division of the Western District of Tennessee, at Memphis.

All forms and formalities in regard to the taking of said deposition are waived, exceptions as to relevancy and competency alone reserved to the hearing.

Personally appeared before me, a Notary Public, in and for the

County of Holmes and State of Mississippi. Dr. H. W. Turnipseed, of said County and State, who is well known to me and he being first duly sworn states that the answers to the following interrogatories are true.

[Seal of J. M. Jones.]

J. M. JONES,
Notary Public.

Direct examination by McKINNEY BARTON:

Int. 1. Please state your name, age, residence and occupation.

Dr. H. W. Turnipseed, age 40 years; Tchula, Mississippi; Physician & Surgeon.

Int. 2. Please state whether or not you are a graduate of any medical college and how long you have been practicing medicine.

I am, and I have practiced medicine twelve years.

Int. 3. State whether or not on or about May 8th, 1911 you attended one D. C. Wright who was injured in a railroad accident at Gwin, Mississippi on or about this date.

I attended D. C. Wright, on or about May 8th, '11 at Gwin, Miss.

Int. 4. Please state the condition you found the said D. C. Wright in?

Right leg was broken; right thigh was broken; right as innominato, or hip bone, was broken; large gashes were cut on right leg and thigh; right hand was nearly severed from fore-arm, and fore-arm was badly lacerated. Injuries on head and also internal injuries.

Int. 5. Please state what you did for the said D. C. Wright and where you took him for treatment?

I gave him antidotes and stimulants hypodermically; removed his right hand, washed and disinfected his wounds, and placed them in temporary dressings. I carried him to Yazoo City, Miss., for treatment.

Int. 6. Please state the nature of his injuries?

Injuries were very serious and painful.

Int. 7. Please state whether he suffered much or little?

He suffered much.

Int. 8. Please state how long he was conscious?

58 He was conscious about one hour.

Int. 9. Please state if he died?

He died.

Int. 10. If you answer to the preceeding question "yes" please state whether he died as a result of the injuries sustained in this accident?

He died as a result of injuries sustained in the wreck at Gwin, Miss. on or about May 8th, '11.

H. W. TURNIPSEED, M. D.

Cross-examination waived.

Mr. McKINNEY BARTON: With that, we rest, if your Honor please.

The COURT: Go ahead, Mr. Briggs.

Mr. BIGGS: I have a motion I would like to present your Honor.

The COURT: Well, you may present the motion.

Mr. BIGGS: Well, I would be glad for the jury to be withdrawn, your Honor.

The COURT: You may retire, gentlemen, for a moment.

Thereupon the jury retired, and the following occurred in their absence and out of their hearing:

Motion for Peremptory Instruction.

Mr. BIGGS: I move your Honor to direct a verdict for the defendant, Yazoo & Mississippi Valley Railroad Company, in this case, because the entire proof shows that the plaintiff was injured as the result of matters which he assumed in the course of his employment, and is covered by the doctrine of assumption of risk; and especially is that true, in view of the rules of the Company which they have introduced, and when your Honor's attention is called to the rules, which I understand your Honor has permitted to go in evidence——

The COURT: I understand that they may read such rules as they desire in evidence.

Mr. BIGGS: The entire book is admitted.

The COURT: The entire book is in evidence.

Mr. BIGGS: I understood your Honor to admit the whole book in evidence.

Judge BARTON: We are designating what parts we want to read.

The COURT: I admitted them as the rules of the Company. And when he asked you if the entire book be introduced, I understood you to say you wanted him to point out what he desired to read.

Mr. BIGGS: I meant by that that I did not want to copy the whole book in the record.

59 The COURT: I understand now they are in evidence. Go ahead. He says now they are all in.

Judge BARTON: Yes, sir. It was then agreed and understood that each party might read in evidence such rules as might be desired pertinent to the issues.

The COURT: With that understanding, you may proceed.

Mr. BIGGS: I call your Honor's attention to rule No. 523, on page 59, which reads as follows:

"Trains and engines must be run with caution when entering or moving through sidings or yards tracks, expecting to find then occupied."

Another rule, which I will call your Honor's attention to is rule No. 106, at page 24, which says:

"In all cases of doubt or uncertainty the safe course must be taken, and no risks run."

Now, then, if your Honor please, my proposition is, that, in view of these yard rules which this man was acquainted with, the book of rules being one that it is said he had himself, that, when this man entered a terminal yard, he expected to find sidings and tracks occupied or obstructed, and that that was one of the incidents of entering a yard and one of the incidents of his employment, and

he assumed the risk of injury resulting from finding the track occupied partially, or wholly.

Second, the record further shows, that he deliberately, in this case, assumed the risk, for from his point of view, his attention was attracted to the fact that these cars were probably not in the clear. Then, under rule 106, it was his duty to stop his train. He asked his fireman if they would clear. The fireman didn't immediately answer him, and, therefore, he ought then to have stopped at once, when the danger was apparent to him as it evidently was before asking the question the second time, and he ought to have no chances, and ought to have stopped his train. Now, then, if he saw these coal cars—and he must have seen them, because he asked if the coal cars would clear, he deliberately assumed the risk of being able to pass by those cars, and if he was injured as the result of passing, then there can be no recovery.

My third proposition is, that no act of negligence on the part of the Railroad Company has been proven. The mere fact that cars occupied, wholly or partially, switch tracks or lead track inside of a yard, was not an act of negligence. The witness testifies that they had gone in on a switch track, and had closed the switch. Now, then
it is not an act of negligence, in and of itself, for cars to
60 be projecting out of a siding, or on sidings, or to wholly
occupy them in the yard, and I submit that no act of negligence has been proven, and if there was any act of negligence it was the negligence of the engineer, who attempted to take the risk.

The COURT: Let the motion be overruled. Call in the jury.

To which ruling of the Court, and to the action of the Court in refusing to give to the jury a peremptory instruction to find in favor of the defendant, upon the evidence introduced by the plaintiff, the defendant, Yazoo & Mississippi Valley Railroad Company, then and there duly excepted.

The COURT: I think this Act passed by Congress abolishes the doctrine of Assumption of Risk in cases where accident is caused by or proximately contributed to by the negligence of the carrier.

Mr. BIGGS: My idea is, that the Act of Congress doesn't affect the doctrine of assumption of risk in a case of this kind, under the decision of the Supreme Court.

The COURT: I understand, if there is negligence on the part of the Company, he doesn't assume the risk, as I construe it. Your motion presents that question. Call your first witness.

The jury was then recalled, and the trial of the case was resumed in their presence and hearing, as follows:

Defendant's Proof.

The defendant, Yazoo & Mississippi Valley Railroad Company, in support of the issues, on its part, introduced the following evidence:

Mr. STRAUSS, the first witness introduced on behalf of the defendant, being duly sworn, testified as follows:

Direct examination for defendant.

By Mr. BIGGS:

Q. What is your name?
A. Strauss.
Q. What is your business?
A. Civil engineering.
Q. Did you make this map here in question?
A. I helped make it. I didn't make it all myself.
Q. I will ask you what it represents?
A. It represents the north part of Gwin yards—from the north end. That is what it represents.
Q. At what scale is it drawn?
A. What was the question, again?
Q. At what scale is it drawn?
61 A. One inch equals twenty feet.
Q. One inch equals twenty feet?
A. Yes, sir.
Q. Does it correctly represent the yards at that scale?
A. It represents the yards, as near as it could be drawn from the other map—that small map.
Q. Did you draw that small map?
A. Yes, sir.
Q. Was the small map correctly drawn?
A. Yes sir, as far as I know.
Q. Have you got the small map with you?
A. It was brought in here. I don't know where it is.
Q. In other words, you had a small map enlarged. (Producing blue print.) This is the map from which that was produced?
A. Yes, sir.
Q. And you say this map is as near a reproduction of that as it can be, by scaling?
A. Yes, sir.
Q. Is that map correct?
A. The one that I had there, yes sir.
Q. That is a correct map?
A. Yes, sir.

Mr. BIGGS: I introduce that in evidence, which is made Exhibit No. 102 to bill of exceptions and so marked. Original large blue print transmitted under agreement of Counsel.

Q. What is the scale of that blue print?

A. One inch equals one hundred feet.

Q. What is the scale of this map (referring to large map on the floor in front of jury).

A. One inch equals twenty feet.

The COURT: One inch equals one hundred feet on that blue print.

Mr. BIGGS: Yes, sir.

Q. In order to avoid measurement from one point on this map to another, where you measured one inch that represents twenty feet on the ground?

A. Yes, sir.

Mr. BIGGS: Take the witness.

Cross-examination for the plaintiff.

By Judge BARTON:

Q. Who made this map?

A. I did.

Q. What did you make it from?

A. From the survey I made out there on the ground.

Q. Who made the survey?

62 A. I did. I made notes, and made it from my notes.

Q. What did you make it with?

A. The copy itself, do you mean?

Q. What did you make the survey with—what kind of instrument?

A. Our profile and chain.

Q. Profile and chain?

A. Yes, sir.

Q. Is that all you had out there?

A. Yes, sir.

Q. How did you make the curves?

A. The curves are located on the old right of way lines; I took those from the old maps.

Q. Then, you don't know anything about the accuracy of those notes?

A. Of the old notes?

Q. Yes?

A. You mean, as to the curves—well, now, which curves do you have reference to?

Q. You figured from that map?

A. Well, to a certain extent, yes, sir. Which curves do you have reference to on that map?

Q. Each of them.

A. Certain curves were taken directly by measurements. This track down here was taken as a base line. This curve out here was taken from the right of way map.

Q. You took it from that?

A. Sir?

Q. You took your figures from that?

A. This curve here was the only one that was taken from the right of way map.

(By the COURT:)

Q. Who took them?
A. That is more than I can tell you.

(By the COURT:)

Q. Who copied that from the right of way map?
A. I did.
Q. You don't know anything about the accuracy of the original map?
A. No, sir.
Q. As a matter of fact, you can't positively state how accurately these curves are platted on that map here, or on this one either?
A. All except this one at the end, I triangled those.
Q. Did you triangle these up here?
A. Yes sir, those were measured too.
Q. When?
A. At the time this survey was made.
63 Q. I thought you platted them from this map?
A. I said the curve in that—this curve here at the end.
Q. Did you triangle them? Did you make actual measurements on this map to get those curves?

The COURT: He is talking about this map here?

A. Yes, sir.
Q. Do you know that those curves are correctly put in there?
A. Yes, sir.
Q. Shown on this map?
A. Yes sir, they are a reproduction of that map there.
Q. And that may was made from an old survey?
A. No sir not entirely.

Judge BARTON: Well, stand aside.

Redirect examination for defendant.

By Mr. BIGGS:

Q. This map (blue print) which I have introduced in evidence, just point out the curve on there that you took from the right of way map.
A. This curve (indicating).
Q. What about these other curves where the switches go off?
A. They were measured.
Q. By whom?
A. By myself.
Q. Then, are they correct?
A. Yes, sir.
Q. As shown on that map?
A. As shown on the map?
Q. And this is simply an enlargement of this present map?

A. Yes sir, and enlargement of this map.

Mr. BIGGS: That's all.

Witness excused.

Mr. BIGGS: Come around, Mr. Dubbs.
The COURT: He ought to have been under the rule.
Mr. BIGGS: He is a representative of the Company your Honor.
The COURT: Who is that man assisting you?
Mr. BIGGS: The claim agent.
The COURT: Go ahead.

Mr. T. L. DUBBS, the next witness introduced on behalf of the defendant, being first duly sworn, testifies as follows:

64 Direct examination for defendant.

By Mr. BIGGS:

Q. What is your name?
A. T. L. Dubbs.
Q. What is your occupation?
A. Superintendent.
Q. Of what railroad?
A. Y. & M. V.
Q. Where do you reside?
A. Memphis.
Q. How long have you been in the railroad business, Mr. Dubbs?
A. Thirty-five years.
Q. What positions have you occupied?
A. Message boy, telegrapher, brakeman, conductor and train dispatcher.
Q. Most all of then, up to superintendent, if that right?
A. Quite a *number*.
Q. Mr. Dubbs, has the Yazoo & Mississippi Valley Railroad, and did it have in 1911, in May, a book of rules for the government of its employes?
A. No, sir.
Q. I here hand you a book which purports to be a book of rules of the Company and ask you if that is a book of rules of the Y. & M. V. Railroad Company in force at that time?
A. Yes sir, prior to September 1st.
Q. Up until September 1st, 1911?
A. Yes, sir.
Q. Mr. Dubbs, are you acquainted with the practical operation of Railroads?
A. To some extent, yes, sir.
Q. I will ask you what is a railroad yard—what do you understand to be a railroad yard?
A. Well, it consists of tracks, constructed for the purpose of——
Q. Speak a little louder, Mr. Dubbs.
A. It consists of tracks for the purpose of storing cars, forwarding trains and storing trains.

Q. I will ask you what governs the movement of trains in yards not on the main line?

A. They move without train orders.

Q. Without train orders?

A. Yes, sir.

Q. How do they move with reference to the tracks therein?

A. They are expected and required to proceed carefully, expecting to find switches—yard switches——

65 Mr. McKINNEY BARTON (interrupting): We object to that, if your Honor please. The rules speak for themselves.

The COURT: He has just stated that the rules do not apply to movements in the yards.

Mr. BIGGS: No, sir, I beg your Honor's pardon.

The COURT: He said movements without train orders. If you have rules to that effect, the rules are the best evidence.

Mr. BIGGS: I wanted to show how trains go through yards; what they expect to find; what are in yards; the conditions surrounding the men when they take trains into yards; I think that is competent proof.

The COURT: What is the rule controlling the movement of trains within the yards—is that all you have on them? Your question is, if they must move with caution.

Q. If you have rules—will you point out the rules of this company that apply to the movement of trains in yards?

Mr. BIGGS: I was mistaken about my question. I think the witness ought to be permitted to proceed with his answer.

The COURT: They couldn't be handled regardless of rules.

Mr. BIGGS: I understand that, but the condition in which you find yards—I will get to that later.

The WITNESS: We have rule 523.

The COURT: Read it.

The WITNESS (reading): "Trains and engines must be run with caution when entering or moving through sidings or yard tracks, expecting to find them occupied."

Q. What is the purpose of that rule, Mr. Dubbs? Speak out.

A. The purpose of the rule is to prevent accidents.

Judge BARTON: I think the rule shows its own purpose.

The WITNESS: To prevent accidents and make safe operations in the yards.

Q. Safe operation in yards?

A. Yes, sir.

Q. In any book of rules?

A. We have here rule 833.

Q Rule 833?

A. Which applies to any other part of the railroad, whether in or out of the yards. It is a general rule.

Q. Read that rule, will you—page 90.

66 A. That is under the caption of rules for Enginemen. (Reading) "They must keep a constant and vigilant lookout

for signals and the position of switches while running, also for obstructions and defects of track, and must frequently look back, especially while rounding curves, to see whether they have the whole train and it is all right."

Q. Now, I call your attention to rule 106 on page 25—at the bottom of page 24.

A. Rule 106 reads, "In all cases of doubt or uncertainty, the safe course must be taken and no risks run."

Q. Now, Mr. Dubbs, as a practical matter, I will ask you to state what is the customary condition of yards, so far as cars being upon the tracks in yards? Just tell the Court and jury.

Judge BARTON: Now, we object to that.

The COURT: Go ahead.

Judge BARTON: We reserve exception.

A. Frequently tracks are obstructed for various reasons, in yards. It is expected. It would be impossible to enumerate all the reasons. Conditions arise from time to time which make it impossible to keep all the tracks clear of cars. Cars will be standing on any track in the yards; liable to find them there at any time.

Q. Well, is that a condition prevailing generally in railroad yards?

A. It is.

Q. Do you know, from experience and observation, that that is true?

A. I do.

Q. So that this rule 523, which says that they must move with caution in yards, expecting the switches to be occupied, is that indicated for that purpose, and promulgated?

A. Yes, sir, it is.

Q. Whose duty is it, in running into a yard, to see whether the switches are occupied?

Judge BARTON: We object to that, your Honor.

The COURT: He may say, if he knows.

To which ruling of the Court, the plaintiff, by counsel, duly excepted.

A. It is the duty of the engineer, provided cars are not being pushed ahead.

Q. Provided cars are not being pushed ahead by the engine?

A. Yes, sir, in front of the engine.

67 Q. Mr. Dubbs, if an engineer enters a yard, and is proceeding along on a siding from which other switch tracks lead off, and if there appears before him on a siding connecting with the track upon which he is moving, cars extending upon another siding, and he is in doubt as to whether the cars obstruct his track, or his track is clear, what is his duty?

A. To stop.

Mr. MCKINNEY BARTON: Wait a minute. Your Honor, we object to that. I think that is incompetent, irrelevant and immaterial.

The COURT: I think it is answering the very question that is before the jury.

Mr. BIGGS: Well, but the proposition that I present is, that here is an experienced railroad man who understands the practical working of a railroad and operation of its trains—

The COURT (interrupting): I know, but we are trying the question here — was violating his duty. That was in a question this morning in regard to some other matter. I think the rule applies here. He may state what the situation is here and the rule of the Company.

To which ruling of the Court, the defendant, by Counsel, duly excepted.

Q. Mr. Dubbs, what are the rules of this Company, and what do the usages of railroading require under the circumstances I have already detailed?

Mr. MCKINNEY BARTON: We object to that. The rules are here in evidence and speak for themselves.

The COURT: The rules are the best evidence on the subject.

Mr. BIGGS: The proposition I am presenting is, here is a rule that says one thing; I put to him a concrete case, and ask him what the rules of the Company require, and let him point to the rules—

The COURT (interrupting): The substance of that question is to ask this man if this engineer was guilty of negligence, and that is the very question we have got here before this jury.

Mr. BIGGS: I do not regard it that way, your Honor.

The COURT: That must be the force of it.

Mr. BIGGS: The proposition I want to present to this witness—I would like to put in the record what his answer would be.

The COURT: He has got it in, but I exclude it on motion by counsel for the plaintiff. Go ahead.

68 To which ruling of the Court, defendant, by counsel, duly excepted.

Q. Now, I will ask you to state how tracks are frequently occupied in yards; tell in what way, in what manner the enginemen in railroad yards—what they encounter; state what a man should look out for, and what he may expect to encounter?

A. Well, within the yard, the enginemen—

Judge BARTON (interrupting): We object to that. I don't think that is competent in that shape.

The WITNESS (continuing): Are required—

Mr. BIGGS: Wait a minute. Judge Barton has objected.

The COURT: Go ahead.

The WITNESS: Are required—

Mr. BIGGS: I can't hear you.

The WITNESS: Enginemen are required within the limits of a yard, to keep a lookout ahead for the purpose of ascertaining whether the tracks are clear, the tracks which they intend to use—

The COURT: That is not the question.

Q I say, what may they expect to encounter in the yards, in regard to the situation of tracks?

A. Switches in improper position, and cars obstructing the tracks?

Q. Switches in improper position and cars obstructing the tracks? That is what you said?

A. Yes, sir.

Q. Mr. Dubbs, I call your attention to rule 525 on page 59. Will you read that rule?

A. (Reading) "Cars on side tracks, whether in yards or at stations, must stand clear of all other tracks."

Q. State whether, or not, it is possible to always enforce that rule?

Mr. McKinney Barton: We object to that. If that is a rule of the Company, they ought to follow it.

The Court: Wait a minute. If it is a rule of the Company, I don't think it would be competent for you to show that they can violate a rule that is laid down.

Mr. Biggs: I am asking how that rule operates. Now, for instance, as I shall undertake to show, a train comes in——

Q. Do you know what the capacity of these yard tracks is?

A. I can't say positively.

Q. Can't say positively?

69 A. I can tell you what I think they hold from looking at them.

Q. Well, you have charge of the terminals in Memphis, Tennessee, haven't you?

A. Yes, sir.

Q. Now, Mr. Dubbs, are trains ever carried into yards with more cars than can be put on a track?

A. Frequently.

Q. Well, suppose a train moves into a yard and finds the yard tracks occupied or obstructed, what is it then the duty of the engineman to do?

A. He is governed by the instructions of the yard master and conductor.

Q. Well, suppose he finds it obstructed—something in front of him, what is it his duty then to do?

A. Some member of the train or engine crew—do you mean, obstructed to such an extent that he cannot proceed with his train?

Q. Yes, sir, or that he ought not to proceed?

A. He stops and sends word to the man in charge of the yard that the track is obstructed, and that he is unable to bring his train into the receiving track, or designated track, and stop.

Q. Does it ever happen that trains are brought into a yard with more cars than one siding will occupy or hold?

A. Yes, sir.

Q. State whether, or not, that is a frequent, or infrequent occurrence?

A. Quite frequent.

Q. What is done then by the yard crew, when they bring in a train under those circumstances?

A. Very frequently they have the road crew to put some—leave as many cars on one track as that track will hold, and place the additional cars on some other track.

Q. Anything else ever done?

A. Sometimes the road crews are relieved—it is arranged that the road crews be relieved and the yard engine takes care of the cars which obstructed the adjoining track.

Q. During this time, is there any obstruction to the adjoining track—during the time that that is being done?

A. Until the cars are——

Judge BARTON (interrupting): I don't see the materiality of all these hypothetical questions, and we object to them. There is nothing to justify this examination.

70 Mr. BIGGS: My theory of it is, your Honor—I may be wholly wrong—that in yards trains are carried in frequently too long for the track, and for other reasons the tracks are obstructed, and that is a common occurrence, and I want to show, and I want to show that when he, a good engineman, and experienced man engaged——

The COURT (interrupting): How could a railroad company excuse itself from negligence, if it committed negligence, because it didn't have sufficient accommodations for its trains?

Mr. BIGGS: No, that is not my proposition.

The COURT: That is the point you are making.

Mr. BIGGS: That then it would not be an act of negligence if they brought in a train that was not long enough to hold——

The COURT: Go ahead, Mr. Biggs. There is no objection here.

Judge BARTON: Yes, we are objecting to it, your Honor. One ground is, that no such condition is shown here.

Mr. MCKINNEY BARTON: We object to further examination along that line.

(The court made no ruling on the objection.)

Mr. BIGGS: Take the witness.

Cross-examination for plaintiff by Judge BARTON:

Q. What is your name?

A. T. L. Dubbs.

Q. I want to ask you to turn to page 59—first, turn to page 57, and state how these rules and the rules set down on page 59 are heard—what are they—page 57, how are those rules headed?

A. General Rules.

Q. Now, I will ask you to turn to page 59 and read rule 525.

Mr. BIGGS: He has read it. He has already read that.

A. "Cars on side tracks, whether in yards, or at stations, must stand clear of all other tracks."

Q. Now, I want you to turn to page 62, and read rule No. 601.

A. (Reading) "Conductors report to and receive instructions from the train master. They will obey the orders of the yard mas-

ters within yard limits, and will be governed by the directions of agents in doing work at stations."

Q. Now, turn to page 65, and read rule 627.

A. (Reading) "In leaving cars upon side tracks, they must see that they are entirely clear of any street, highway or private crossings."

71 The COURT: How is that application here, Judge Barton? How is that rule applicable here where they must be clear of streets and crossings?

Judge BARTON: I made a mistake in referring to it. I was trying to locate it.

The COURT: Now, since you have got this book of rules in I don't see why we should stop to have this witness identify the rules.

Judge BARTON: Well, we can read these in the argument, can we?

The COURT: That is what I understood counsel to agree to a little while ago. Well, it is now adjourning hour. Gentlemen of the jury, remember the admonitions of the Court about not discussing this case. We will now take a recess until two o'clock.

The Court then adjourned until two o'clock P. M., at which time the trial of the case was resumed, as follows:

Mr. BIGGS: If your Honor please, I will want to recall Mr. Dubbs, but before I recall him, I want to examine Mr. Walsh, who wants to get away.

The COURT: All right.

Mr. BIGGS: I think that I excepted this morning, when I was examining the fireman about the danger of going from the engineer's side to his side, to the statement which your Honor made about an act of emergency?

The COURT: That I made?

Mr. BIGGS: Yes, sir.

The COURT: I only asked the question.

Mr. BIGGS: It was in reply, as I caught it, to my statement.

The COURT: All right.

Mr. JNO. M. WALSH, was thereupon introduced as a witness in behalf of the defendant, and being first duly sworn, testified as follows:

Direct examination for defendant by Mr. BIGGS:

Q. Mr. Walsh, what is your occupation?

A. Superintendent of terminals for the Frisco.

Q. How long have you been so engaged?

A. Nearly four years.

Q. How long have you been in the railroad business?

A. Since 1880.

Q. Have you had much, or little experience in the operating department of railroads since that time?

A. Continuously since that time.

Q. How have you been employed?

72 A. As a switchman, brakeman, conductor, yard master, train master, assistant superintendent, superintendent, general superintendent, and superintendent of terminals.

Q. Mr. Walsh, are you acquainted with the manner in which cars and trains use terminals and yard facilities?

A. Yes, sir.

Q. Are you acquainted with the general method in vogue in this section in which cars are placed in terminals and yards?

A. Yes, sir.

Q. I will ask you to state to the jury in what manner cars are put upon tracks in terminals, and how the enginemen entering the terminal must proceed, and what conditions he may expect to find confronting him in regard to the situation of switches, cars, etc.?

Mr. McKinney Barton: Wait a minute. That is objected to as being incompetent, irrelevant and immaterial. The rules cover it, and Mr. Dubbs has testified to the custom in yards, how they were handled, and the rules cover this entirely.

The Court: Let him answer, if he knows how they are handled in yards.

To which ruling of the Court, the plaintiff, by counsel, duly excepted.

Q. Go ahead.

A. Certain limits are defined as yard limits in which switching crews work on the various tracks, proceeding with such speed as will prevent them from running into other cars left on other tracks by other engines. A great many engines work within yard limits irrespective of the other one's movements, and each must look out for their own protection, not damaging cars by striking them, not running into any other cars, because every other engine in the yard working in yard limits have a right to work in that territory in the absence of another engine. Road trains coming into that territory must move with such speed as will permit them to stop in case any track they may want to use is occupied or partly occupied.

Q. State whether, or not, tracks are frequently occupied and partially occupied, or whether that is a seldom occurrence?

Mr. McKinney Barton: We object to that, your Honor, as being incompetent, irrelevant and immaterial.

The Court: I can't see, Mr. Biggs, how that can be material here, whether they do, or not.

73 Mr. Biggs: I say, your Honor, that it is one of the assumed risks of the service.

The Court: I have stated that my ruling on the law is that the doctrine of assumption of risk has been abolished by the Act of Congress, except where the carrier or employer is not guilty of negligence.

Mr. Biggs: With all deference——

The Court (interrupting): If the defendant Company was not guilty of negligence, and a man is hurt, he assumes the risk, but

I understand that the statute has abolished the old law of assumption of risk.

Mr. BIGGS: With all deference, I understand it differently from your Honor.

The COURT: You may reserve your exception.

Mr. BIGGS: I would like for him to state what his answer would be. I see I have a different view of the law from your Honor.

Judge BARTON: If your Honor please, I withdraw the objection.

Q. My question was, as I now recall, whether, or not, these tracks were frequently occupied wholly or partially, or not?

A. The tracks are occupied wholly and partially by a large number of crews in yards at different places. Cars are left indiscriminately in yard limits, and no one has a right to run into them.

Mr. BIGGS: Take the witness.

Cross-examination for plaintiff by Mr. HOLMES:

Q. Mr. Walsh, have you seen recently, or at any time within the last twelve months, the yards of the Y. & M. V. Railroad Company, at Gwin, Mississippi?

A. No, sir.

Q. Did you see those yards at Gwin, Mississippi, on or about May 8th of last year?

A. No, sir. I have never seen them.

Q. Do you, or not, know what their condition was on May 8th, 1911?

A. No, sir.

Mr. HOLMES: That's all.

The COURT: Stand aside.

Witness excused.

Mr. BIGGS: Your Honor, this morning, I forgot to ask Mr. Dubbs about a matter. I was not well, and might not proceed as rapidly as I would like to.

The COURT: Call him around.

Mr. BIGGS: Mr. Dubbs, take the stand again.

74 Mr. T. L. DUBBS thereupon again took the stand, and testified as follows:

Direct examination for defendant by Mr. BIGGS:

Q. Mr. Dubbs, are you acquainted with the kind of an engine 495 is—I believe that is the number that has been proven here—engine 495?

A. Yes, sir.

Q. I will ask you if, with a train of twelve cars equipped with air, and with an engine of the class of 495—I mean, an engine of the same capacity, you have made any tests upon level tracks as to the quickness and distance within which that train could be stopped when running at certain rates of speed, per hour?

A. I have.
Q. When did you make this test?
A. Sunday, the 21st of this month.
Q. I will ask you to state within what distance, on a level track and with the train moving—did you make a notation of your tests yourself?
A. Yes, sir. At three miles, an hour, it could be stopped——

Judge BARTON (interrupting): I object to that, your Honor, on the ground that they are evidently trying to manufacture testimony for this very case, without the plaintiff, or any representative of the plaintiff, there to know and understand what was done.
Mr. BIGGS: I can make a test without inviting them to be present, can't I?
The COURT: Go ahead.
To which ruling of the Court, the plaintiff, by Counsel, duly excepted.

The WITNESS: May I be permitted to refresh my memory on it?
Q. Did you make it?
A. Yes, sir.
Q. From that test?
A. Yes, sir.

Mr. MCKINNEY BARTON: We object to it for the further reason that the experiment was not made at a place and under conditions shown to be the same as the scene of this accident.
The COURT: I think that objection would likely be good.

Q. Well, Mr. Dubbs, do you know what kind of track this lead track at Gwin is—what kind of grade that track has, if any?
A. No, sir, I do not, but I am under the impression——

75 Mr. BARTON: We object to your impression.
The COURT: Yes. Don't give your impression.
Mr. BIGGS: Well, I will introduce the engineer, then, to prove the grade. Will you gentlemen let this come in then after we establish the grade of that track? Well, I would prove it first on a level track, and then on a track with a grade to it. May I be permitted to prove that?
The COURT: I think, to make it competent here, you ought to show——
Mr. BIGGS: All right, stand aside for the present, Mr. Dubbs, and bring in Mr. Love.
The witness retired from the stand.

Mr. THOMAS S. LOVE, a witness for the defendant, being first duly sworn, took the stand and testified as follows:

Direct examination for defendant by Mr. BIGGS:

Q. What is your name?
A. Thomas S. Love.
Q. Where do you live?
A. Tchula.

Q. What is your business?
A. Engine foreman.
Q. What yards are you in?
A. Gwin.
Q. Gwin yards?
A. Yes, sir.
Q. Were you working there last May?
A. Yes, sir.
Q. At the time Mr. Wright was injured?
A. Yes, sir.
Q. Mr. Love, how long have you been in the yards at Gwin, Miss.?
A. Nine years.
Q. I will ask you to state whether, or not, those yards are much used, or not, in the making and breaking up of trains, and passing through of trains?
A. Yes, sir, they are.
Q. I will ask you what is the usual condition of those yards in so far as the number of cars or trains that are in the yards?

Judge BARTON: We object to that. You can prove the condition at that time, but we object to what the other conditions are.
Mr. BIGGS: I will undertake to prove it at that time, and their usual condition.
76 The COURT: You can't show, in a general way, what the operations were in the yard; still I permit you to do it.
Mr. BIGGS: I understand, under your Honor's conception of the law, that would be incompetent and immaterial?
The COURT: The whole question here is as to the question of negligence.
Mr. BIGGS: My proposition is, that we have the question of assumption of risk, and I want to show the conditions that then and there existed.
The COURT: You may show the conditions that then and there existed.
Mr. BIGGS: And what was the usual condition to be met with in the yards.

The COURT: Yes.

Q. How was that, Mr. Love?
A. Why, that yard is usually full. It is used for storage purposes between the Louisiana Division and the Memphis Division.
Q. What is done in those yards, Mr. Love?
A. Why, we make up and break up trains, and bring cars in and hold them and keep them there, and keep the yard usually full.
Q. Keep the yard usually full?
A. Yes, sir.
Q. Do you remember about what this condition was on the 12th of May, the day Mr. Wright was injured?
A. Yes, sir.
Q. What was its condition?
A. It was pretty full.
Q. 8th of May, I mean?

A. Yes, sir.

Q. Mr. Love, what was the situation in that yard prior to the 8th of May, in regard to tracks being occupied, or blocked, or obstructed, wholly, or in part, by cars?

A. Why, they always expect to find it that way. We only operate one engine, and cars have to go up from one end to the other end of the track. There is no one to notify the crew at the other end if they are in. We always go down expecting to find it out.

Q. Mr. Love, do you know the track on which Mr. Wright was moving?

A. Yes, sir.

Q. Can you state to the jury whether, or not, that track, moving south, on that track moving south after the time that you leave the switch down there from the main line, what the grade is, whether it is up, or down grade?

77 A. Well, we consider it level. I never knew there was any grade there.

Q. You never knew there was any grade there?

A. Yes, sir. If there was, I didn't know it.

Q. You have been there eight, or nine years?

A. Yes, sir.

Mr. BIGGS: Take the witness.

Judge BARTON: Stand aside.

Witness excused.

Mr. T. L. DUBBS was then recalled, and testified further as follows:

Direct examination for defendant by Mr. BIGGS:

Q. Mr. Dubbs. I will ask you to state if with a train of twelve cars, and an engine of the same capacity as No. 495, equipped with air, you made a test as to in what distance such a train moving three miles, an hour, could be stopped after a signal to stop was given, and also after the service application of air, and the emergency application, or whatever was done?

A. I did.

Q. On a level track?

A. I did.

Q. Now, how far would such a train move?

Mr. MCKINNEY BARTON: We object to that as being incompetent, irrelevant and immaterial.

The COURT: The objection will be disallowed.

Mr. BARTON: We except.

Q. How far would such a train run?

A. In case in the test of the service application, the train moved a distance of thirty-two feet.

Q. What do you mean by service application?

A. Ordinary application. The service application is the application that is used ordinarily. If a quick stop is desired, the emergency application is used. Just the ordinary service application after the

signal was given, the train moved thirty-four feet, and moved twenty-five feet after application of the brakes.

Q. Now, take a train of the same kind running four miles, an hour. How far would it run?

A. After the signal was given, the train moved forty-six and a half feet, and thirty-four feet after the application.

Q. Take a train that is running six and a half miles, an hour?

A. It moved 108 feet after the signal was given and ninety-three feet after the air brakes were applied.

78 Q. I will ask you if you tested a train running eight miles, an hour?

A. Yes, sir.

Q. Can you stop a train with the service application as quickly as you can with the emergency?

A. No, sir.

Q. Then, by the use of the emergency, you can stop it quicker than you can by the regular service application?

A. Yes.

Q. Did you make a test of a train running eight miles an hour?

A. Yes, sir.

Q. By application of the emergency brakes?

A. Yes, sir.

Q. How far did that run?

A. Seventy-six feet and a half, after the signal was given, and sixty-two feet after the first application of the brakes.

Mr. Biggs: Take the witness.

Cross-examination waived.

Sylvester Johnson, (Cold.) the next witness introduced in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination for defendant by Mr. Biggs:

Q. State your name to the Court and jury?

A. Sylvester Johnson.

Q. What business are you engaged in?

A. D. C. Wright's case.

Q. What railroad are you working for?

A. Y. & M. V. and I. C.

Q. What do you do for the I. C. Railroad Company?

A. Brake.

Q. Braking.

—, ——.

Q. How long have you been braking for the Y. & M. V. Railroad?

A. It will soon be eight years—been over seven years.

Q. Sylvester, were you a brakeman on the train, on the train, on the occasion when Mr. Wright was killed?

A. Yes, sir.

Q. What brakeman were you?

A. I was brakeman on Extra 495.

Q. I mean, what portion of the train were you working on?

A. The head end.

Q. The head end?

A. Yes, sir.

79 Q. As you entered the yards at Gwin on that day, what did you do, relative to throwing the switch, if anything?

A. I threw the switch and he headed in and I caught the engine.

Q. What switch was that?

A. That was the switch lead from the main line, on the lead.

Q. That is the switch that runs from the main line track?

A. Yes, sir.

Q. What was the speed of the train at the time you threw the switch?

A. Well, she had done stopped, and I got off, and I give the signal to come.

Q. After you had thrown that switch to let this train pass from the main line on to the lead, what did you do?

A. I got on the engine.

Q. Got on the engine as it passed?

A. Yes, sir.

Q. Who closed the switch?

A. The flagman.

Q. The flagman?

A. Yes, sir.

Q. What did the train do relative to speed; that is, did it begin to pick up its speed again?

A. Yes, sir, after closing the switch, after leaving the main line.

Q. Was any signal given the engineer after the flagman at the rear end of the train had closed the switch?

A. Yes, sir.

Q. You say you got on the engine?

A. Yes, sir.

Q. Whereabouts on the engine did you get?

A. Up in the gangway.

Q. Where is that? Is that the place there between the engine and the tender?

A. Yes,—and the tender.

Q. On which side of the engine were you? On which side of the cab? Right hand side?

A. Right hand side.

Q. Right hand side?

A. Right hand side.

Q. That is the engineer's side?

A. Yes, sir.

Q. Were you looking ahead?

A. Yes, sir.

80 Q. How were you looking; that is, were you looking through the engineer's window?

A. On the outside.

Q. With your head outside?

A. Yes, sir.

Q. What was your position relative to the engineer? That is, where was the engineer from you?

A. He was up on his seat in the engine.
Q. He was on the same side of the cab that you were on?
A. Yes, sir.
Q. You——?
A. I was down in the gangway, and he was up on his seat.
Q. Both of you looking down the way the train was going?
A. Yes, sir.
Q. Did you see any cars near the track on which your train was going?
A. Yes, sir.
Q. Now, just tell the jury what you saw, and what you said, if anything?
A. I was looking ahead, and seed them, and I spoke to him and told him it didn't look like them cars was in the clear.
Q. Whom did you make that remark to?
A. Mr. D. C. Wright.
Q. You told the engineer?
A. Yes, sir.
Q. Then what was said and what was done?
A. I spoke and told him of it, and he asked the fireman was they clear, and the fireman was putting in the fire at the time, and when he got through, he looks ahead, and he told him they wouldn't clear, and he didn't understand the fireman and he asked me what he said, and I said he said they wouldn't clear, and the fireman had done jumped off, and he leaves his side to go to the fireman's side to see if they would clear, and I jumped off after he left his side.
Q. The fireman jumped off on the fireman's side after he told him they wouldn't clear?
A. Yes, sir.
Q. What did he do?
A. I didn't take time to see. After he started around on the fireman's side, I jumped off.
Q. Where was the engineer when you last saw him, when you jumped off?
81 A. Right even with the fire door.
Q. What was he doing?
A. Going over to the fireman's side, to the left.
Q. Over to the fireman's side?
A. Yes, sir.
Q. Was it necessary for the engineer to go over to the fireman's side to get off?
A. Well, no, sir.
Q. He was on the same side that you got off of?
A. Yes, sir, he left that side, and goes to the left side to the fireman's side.
Q. Were you hurt?
A. No, sir.

Mr. Biggs: Take the witness.

Cross-examination for the plaintiff by Judge BARTON:

Q. You say you are employed in the D. C. Wright case?
A. Yes, sir.
Q. Are you still working for the Y. & M. V.?
A. Now?
Q. What?
A. Now, you mean?
Q. Yes?
A. Yes, sir.
Q. You are working for them. When did you come up here?
A. Why, I came in Saturday off of my run.
Q. Uhhuh.
A. I notified the claim agent then right away, and it was too late for me to get up Saturday, and I went up Sunday.
Q. Do you know Josephine Lloyd?
A. Yes, sir.
Q. Didn't you have a talk with her and threaten her, if she came up here as a witness?
A. No, sir.
Q. Now, where were you—what is your name?
A. Sylvester Johnson.
Q. Sylvester Johnson?
A. Yes, sir.
Q. Where were you when you—where was the engine when you got up on it?
A. When I got up on it?
Q. Yes?
A. When it was headed in, you mean?

(By the COURT:)

Q. When you got on the engine, as you stated a while ago?
A. Yes, sir.
82 Q. Where were you?
A. Just heading in.
Q. Just heading in?
A. From off of the main line, yes, sir.
Q. Now, what switch was it you stopped to turn? Here is a representation of these tracks here (referring to map on floor before the jury); was the switch leading off from this main track here; is that where you caught it?
A. Yes, sir, leading off from the main line.
Q. You got off and opened the switch and turned it to the lead track?
A. Turned it to the lead track, yes, sir.
Q. And after you had done that, you got up on the engine?
A. Yes, sir.
Q. As it passed?
A. Yes, sir.
Q. And then you rode from there clear down to where this accident occurred, just before it struck the car?
A. Yes, sir.

Q. Did you talk with the fireman any?
A. No, sir.
Q. You were standing there right in the middle of the cab just behind the engineer?
A. Yes, sir.
Q. How far had the train run——

Judge BARTON: Well, the map will show that. That's all. You may stand aside.

Witness excused.

Mr. PELTER, the next witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. BIGGS:

Q. Mr. Pelter, what is your occupation?
A. Superintendent of the Southern Railway.
Q. How long have you been in the railroad business?
A. About twenty years.
Q. What experience have you had?
A. I have had general experience.
Q. State in what capacities you have been employed?
A. Well, I have been agent, yard master, train master, assistant superintendent and division superintendent.

Judge BARTON: In order to save time, we will agree that he will testify to the same things as Mr. Walsh.
Mr. BIGGS: All right.

83 Cross-examination for plaintiff by Judge BARTON:

Q. You don't know anything about the yards at Gwin, Mississippi?
A. Where?
Q. Gwin, Miss.?
A. No, sir.
Q. Where this accident occurred?
A. No, sir.
Q. Just one other question. All the railroads have rules for the guidance of the operatives, do they?
A. Yes, sir.
Q. In the yards, and elsewhere?
A. Yes, sir.
Q. And the operatives are bound by those rules?
A. Yes, sir.
Q. The rules are designed to give them full instructions what to do?
A. Yes, sir.

Judge BARTON: That's all.
Witness excused.

Mr. BIGGS: One other thing we have to prove is the size of that train.

The COURT: What is that?

Judge BARTON: One count here in the declaration is, that it was not properly equipped with safety appliances. We abandon that.

Mr. BIGGS: With that admission, then, that the train was equipped, and that we had twelve coal cars in order to show that experiment, the Railroad Company rests.

This was agreed to.

This was all the proof offered by the defendant.

Rebuttal.

The plaintiff thereupon introduced the following evidence, in rebuttal:

Mr. C. W. JOHNSON, recalled by the plaintiff, in rebuttal, testified further as follows:

Direct examination for plaintiff by Mr. BARTON:

Q. Mr. Johnson, how many coal cars were on that scale track at the time of this collision?

Mr. BIGGS: I object to that, your Honor.

The COURT: Let him answer if he knows; that is matter in chief.

A. I don't know how many cars there were on the scale track.

Q. Was that track full of cars, or do you know?

A. I don't know how it was at the south end.

84 Q. But I mean, there where they struck, how many were there together?

A. Three, two coal cars, and one——

Q. (Interrupting.) Who were the brakemen on that train that you were on?

A. I don't know his name. He was a negro.

Mr. BIGGS: I object to that—oh, well——

The COURT: He says he was a negro.

Q. Now, I will ask you whether, or not, when you came up there to that switch, just before going into it—well, I will ask you, at the time you passed the switch here, whether one of the brakemen—negro brakemen got up in the cab and was there at the time of this conversation between you and the engineer?

A. No, sir.

Q. So this negro Johnson, the brakeman, didn't get up in this engine at all?

A. No, sir, he got back on the track some place.

Q. And was not in the engine when you moved up there just prior to the accident?

A. No, sir, he wasn't on the engine.

Judge BARTON: That's all.

Cross-examination for the defendant by Mr. Biggs:

Q. You say that switchman wasn't on the engine?

A. The negro brakeman wasn't. I didn't say nothing about the switchman.

Q. Where does the head brakeman generally ride?

A. Well, they ride at various places over the train.

Q. Where does he generally ride—don't you know that he rides in the engine?

A. He could have rode on the engine in the yard, but he didn't do it.

Q. Where was his place after you pulled through that switch—engine, wasn't it?

A. He could have gotten on there.

Q. That is a place he could have gotten on?

A. Yes, sir.

Q. And that's the place he should have been?

A. That's where he should have been.

Mr. Biggs: Stand aside.

Witness excused.

Rules Introduced by Plaintiff.

By agreement of counsel, counsel for the plaintiff read the following rules from the book of rules of the Transportation Department of the Yazoo & Mississippi Valley Railroad Company:

85 Under Head of General Rules.

"Rule 525. Cars on side tracks, whether in yards or at stations, must stand clear of all other tracks.

Rule 601. Conductors report to and receive instructions from the train master. They will obey the orders of yard masters within yard limits, and will be governed by the direction of agents in doing work at stations. They will conform to the instructions issued by the Passenger, Freight, Treasury and Accounting Departments. They must know the geography of the system, the official list, and the routes of traffic between different divisions."

"Enginemen."

"821. In matters pertaining to the transportation department, enginemen will report to and receive instructions from the train master.

"In matters pertaining to the machinery department, they will report to and receive instructions from the master mechanic and from the foreman of the engine house.

"They will comply with the instructions of the traveling engineer.

"They will obey the orders of yard masters when in yard limits."

Firemen.

"866. When their other duties permit, they must keep a careful watch upon the track and instantly warn the engineman of any obstructions or signals.

"When approaching and leaving a station, they must observe markers on the rear of the train and watch for signals from train men or other station employes."

Station Agents.

"1027. They must not allow cars within their station limits to stand upon or obstruct the main track or sidings without permission of the train master, unless in charge of train or yard men."

"1028. They must see that brakes are securely set on cars left at stations and when standing on grades, or if brakes are defective, that the wheels are blocked."

They must see that cars left at stations stand entirely clear of street and highway crossings, and when practicable at least fifty feet distance from such crossings. They must see that cars are not moved by unauthorized persons."

Yard Masters.

462. "They will have charge of assistant yard masters, engine foreman, helpers, switch tenders and such other employes as
86 the superintendent may direct; also of enginemen and trainmen within yard limits."

"467. They will be responsible for the prompt movement and proper disposition of all engines, cars and trains within yard limits."

"468. They must see that cars are carefully handled."

This was all the evidence in the case.

Motion for Peremptory Instructions for the Defendant Renewed.

Mr. Brabs: Before we start on the argument, if your Honor please, I desire to renew the motion which I made at the close of the plaintiff's proof.

I move your Honor to direct a verdict for the defendant, Yazoo & Mississippi Valley Railroad Company, on the grounds:

1. That there has been no negligence shown on the part of the defendant.

2. That the obstruction of the car would not be a defect within the meaning of the employers' liability Act.

3. That, upon the proof introduced by both plaintiff and defendant, the plaintiff assumed the risk of injury by reason of the occupation or obstruction, in whole, or in part of the tracks, switches, or sidings, while in yards.

4. Also an additional ground that the plaintiff's intestate is shown by the proof to have known the proximity of the cars to the track, and assumed the risk in going by them.

After argument upon the motion, the Court overruled the same, and all the grounds thereof, to which action and ruling of the Court, upon each of the grounds of said motion, the defendant, Yazoo & Mississippi Valley Railroad Company then and there duly excepted.

WRIGHT
vs.
I. C. R. R. Co.

Charge to the Jury.

GENTLEMEN OF THE JURY: In this case Mrs. Ada R. Wright, administratrix of D. C. Wright, deceased, has sued the Yazoo & Mississippi Valley Railroad Company for fifty thousand dollars as damages, and for cause of action she alleges that her husband and intestate was injured in a collision on the Yazoo & Mississippi Valley Railroad Company at Gwynne, Mississippi, and that the collision was caused by the negligence of the defendant company, and that that negligence caused of proximately contributed to the
87 death of Mr. Wright.

There are several grounds of negligence stated in the declaration—I should say practically the same ground is stated in different ways, but the negligence which I gather that is charged, and which I shall submit to you is that the defendant had left upon one of its spurs or side tracks, in the yards at Gwin, a car so close to the track on which the plaintiff was pulling defendant's train that it was not in the clear, and that is the act of negligence that is alleged, and upon which, I take it, this suit is based. The act of leaving the car so near the main line that the engine struck it is alleged to be an act of negligence, and was the direct cause, or contributed to the death of the plaintiff.

The Railroad Company filed three pleas in response to the declaration. The first one is that it is not guilty of the matters and things set out in the declaration. Second, that the injury and death of the plaintiff's intestate was due to the negligence of the plaintiff's intestate—a plea of contributory negligence. And, third, she cannot recover because the deceased had assumed the risk incident to his employment, and that the conditions appertaining at Gwin on the occasion of the accident and the injury was a risk which he had assumed, and she cannot recover. These pleas make the issues which we are trying, and which you must settle under this proof.

The suit is based upon what we know as the Employer's Liability Acct, a law passed by the Congress of the United States, and I shall submit the case to you under that act, as I understand it to be.

It appears that the accident happened in the yards of the defendant Company at Gwin, Mississippi, and I instruct you that the rules of the Company, if any have been proven applicable to the movement of trains in yards, governed the movement of this train at the time the accident happened, and that the definition of "railroad yards," as contained in the Company's book of rules, is as follows:

"A system of tracks within defined limits, provided for the making up of trains, storing of cars, and other purposes, over which movements not authorized by time-table or by train order, may be made, subject to prescribed signals and regulations."

These rules apply to the movements of trains within the yard limits at Gwin.

I charge you that under the Employer's Liabiliy Act the plaintiff cannot recover in this case for the death of T. C. Wright,
88 unless, you find that the railroad company, or some of its employes other than T. C. Wright, was guilty of negligence, proximately contributing in some degree to the accident. If the negligence of Wright was the sole cause of the accident, plaintiff cannot recover, and your verdict should be for the defendant.

The burden of proving the negligence of the company or its agents and servants other than T. C. Wright is upon the plaintiff, and unless by a preponderance of the testimony some negligence has been proven, proximately contributing in some degree to the accident, there can be no recovery.

That is to say, under the first issue, (whether or not the defendant is guilty of negligence) the burden of proving negligence is upon the plaintiff, and she must prove that by a preponderance of the evidence in the case. As I remember the testimony, there is no dispute about it in so far as it relates to the car standing on the side track at Gwin close enough to the track on which this train was moving that it struck it. I submit the question to you, gentlemen, as to whether or not that was an act of negligence on the part of the Company.

One of the rules of the Company that was offered in evidence reads as follows: "Cars on side tracks, whether in yards or at stations, must stand clear of all other tracks." That was one of the rules of the Company, and (outside of the rule of the company), the question for you to determine is, whether or not it was an act of negligence upon the part of the Railroad Company to leave that car so close that a moving train would strike it.

If you find that it was negligence, then your next inquiry would be, did the car standing there proximately contribute to the accident. If it did, and you find both of these propositions in the affirmative, then this plaintiff is entitled to a recovery at your hands.

Much evidence has gone before you, or a quite a lot, tending to show the manner of operating trains of cars in switching yards. You heard all of it. With that before you,—the facts of the accident as it occurred, you will determine if the act of leaving the car at the point of the accident was the act of negligence that proximately contributed to the accident. If you find that it was not, then there is no need for you to investigate this case further, but return a verdict that you find the issues joined in favor of the defendant.

But assuming that you find that it was an act of negligence to leave the car there, and that it was standing so close that it was

not in the clear of the track on which this train was moving,
89 and that it proximately contributed to the accident, and that the plaintiff is entitled to a recovery, then your next consideration would be to determine whether or not the deceased himself was guilty of negligence. Upon that issue, the burden of proof is upon the defendant Railroad Company. It has plead that as one of its defenses, and it must establish by a preponderance of the evidence that that allegation of contributory negligence is true. The only effect that negligence on the part of the deceased can have is to reduce your verdict from what it would otherwise be in case there was no contributory negligence. Whatever contributory negligence you find him guilty of, that proximately contributed to the accident and his death will go in reduction of the amount of damages that this plaintiff would be otherwise entitled to recover in the proportion that you may find it to be to the negligence on the part of the company. That is to say, if the negligence of the company was great, and the negligence of the deceased was slight, although it contributed to the injury, why, it must go in reduction of his damages in that proportion. So you will get the idea that the negligence of the deceased must go in reduction of the damages that the plaintiff would otherwise be entitled to recover if there had been no negligence on the part of the deceased.

How are you to determine the amount of negligence of this deceased? You have heard all the evidence; you have heard the testimony of the fireman, you heard the testimony of the colored man, Sylvester Johnson, who was the flagman on the front end of that train, and these, so far as I now recall were the only eye witnesses to what occurred. You have seen the plat of the station; you have heard it explained by those who made it, and who understood the yards; you have heard stated the speed at which this train was moving in the yards; you have heard the rule pertaining to the movement of trains within the yards. Now, was this deceased at the time of this accident, moving his train in the yards at Gwin in accordance with these rules; was he moving cautiously; was he acting as a reasonably prudent man would have acted under like conditions and circumstances. If he was, then he would not be guilty of contributory negligence. If he was not, then he would be guilty of contributory negligence in some degree, but it is for you to determine in what degree that might or might not have contributed to the accident. I express no view as to the weight of the evidence, or what it proves, but leave that to the jury to say.

90 In the view that I have taken of the law as to the third plea, I do not think it proper to charge the jury upon the question raised, that is, the assumption of risk. But I submit this case to you upon the negligence of the defendant company, in the first place, if any has been shown by the proof, and in the second place, the negligence of the deceased, if any has been shown.

The presumption is that these men in charge of the train, and connected with these grounds and yards where the accident occurred, did their duty, all of them. Where one undertakes to meet and overturn a presumption, the burden of proof is upon him to do so

by the greater weight of the evidence. By the burden of proof is meant that the party proposing to establish a proposition must do so by evidence that is of greater weight than the evidence which is against the truthfulness of the proposition. It is not enough that it is of equal weight, but it must preponderate, it must be of greater weight; if it is of equal weight or less weight than that against it, then the party having the burden fails in his proposition. And that duty shifts from one party to the other as the burden of proof may pass from one party to the other to establish a given proposition. As I illustrated a while ago, the plaintiff here must establish by the preponderance of the evidence the negligence of the company and that it proximately contributed to the accident and the death of her husband. And then when the defendant pleads contributory negligence on the part of the deceased, it takes the burden of establishing that proposition,—it must establish that by the greater weight of the evidence.

You are the sole judges of the evidence and its weight. If there are conflicts in it, it is your duty to reconcile them, and if they are such that you cannot reconcile them, the- you must go to work to determine which of the witnesses you believe, and what portion of the evidence you do not believe, and when you have determined that, you take out that which you believe from that which you disbelieve, and upon the facts as you find them to be, predicate your verdict under the law.

And for the purpose of arriving at what evidence you believe and what you disbelieve, you should take into consideration the appearance of the witness upon the stand, the reasonableness of his story; the opportunity he had to know the facts about which he testified; whether or not he is related to these parties one way or the other, whether by blood relation,—husband or wife, or otherwise, or whether he is an employe of the defendant company; whether he is interested in your verdict one way or the other, and that
91 only for the purpose of determining what weight you will give to his testimony. If his appearance, his manner of testifying, was sufficient to show he knew the facts about which he testified, and lead you to believe he is a man to be trusted, that he told the truth, and he has told a story which you believe, the mere fact that he may be related to the parties, either plaintiff or defendant, would be of no consequence to you. It is only important in so far as it may warp the party from telling the truth. If it does not do that, the testimony stands before you upon the same grounds and in the same light as the testimony of any other witness who is credible.

You should not be influenced in your consideration of this case by the fact that the plaintiff here is a widow—a widow of the deceased, or that she has children who are left orphans. Nor, upon the other hand should you be prejudiced against the defendant railroad company because it is a corporation, engaged in transporting men and freight over this country, for they stand before you upon equal grounds, and their rights must be measured to them from the same scales, and the more nearly you come to that statement, the

more nearly you discharge your duties, because you readily see when jurors or courts shall undertake to decide cases of this character, or any character, from sympathy or prejudice, why we throw the law to the winds, and there will be no rule of right or justice left to be administered or could be administered in the courts.

If you find there is a liability, then your next consideration should be, how much should the verdict be?

There is no rule by which you can take a pencil and paper and multiply or divide or add or by any other means of calculation arrive at that. In this case you will take into consideration the age of the deceased; his expectancy in life. The tables introduced here show that a man of his age, in good health, might reasonably expect to live 27½ years longer. You will take into consideration his health; his habits; whether or not he was an industrious man; his earning capacity; what was he capable of earning, under this proof; the pain and suffering he endured at the time he was hurt, and then say what sum would reasonably compensate those entitled to recover, if they are entitled to recover for his death and suffering.

You can readily see that it would not be a proper manner to arrive at that result by taking the number of years that he might reasonably expect to live and multiply it by what he was earning, for the reason that he might die next week, or five years, or ten years from now, or, as he grows older, he might not be able to find em-
92 ployment at $150 a month by reason of his infirmity and age, and other things that might arise that are in the range of probability. For that reason you couldn't well sit down and make up your verdict by multiplying $1800 by 27, but you take all those elements together and then say for yourselves what sum would reasonably compensate the plaintiff. If you find that the deceased was guilty of contributory negligence, then you determine what proprortion that bears to the negligence of the company, and reduce your verdict in the proportion that plaintiff's negligence bears to that of the defendant, as I have heretofore tried to state to you.

If you find for the defendants, you return your verdict "We find the issues joined in this case in favor of the defendant." If you find for the plaintiff, you return your verdict, "We find the issues joined in this case in favor of the plaintiff and fix the damages at—whatever you may find.

Special Requests and Exceptions to Charge.

The COURT: Is there anything further?

Judge BARTON: We have some instructions, your Honor. Some of these instructions were prepared before your Honor's charge.

The COURT: I wish you would just point out which you expect me to charge and not have me to read them all over.

Judge BARTON: I will ask your Honor to charge those in writing then, and not any in typewriting; if your Honor can read them,—I don't know.

The COURT: I think myself it will likely be a job. (After examining papers) "I charge you that there is a count in plaintiff's

declaration charging that the other agents and servants of the defendant company were negligent in not warning plaintiff's intestate of the danger sooner and it is contended by plaintiff that the fireman was negligent in assuring the deceased that all was all right and in afterwards failing to notify deceased of the danger in time to stop his engine. I charge you if you find that the fireman was negligent in this respect and his negligence was the proximate cause of the injury, then you must find for the plaintiff."

The other one is declined.

Now, Mr. Biggs?

Mr. BIGGS: Apart from your Honor's charge I first desire to note an exception to your failure to give the directed verdict as requested.

The COURT: That is one of the special requests which I decline.

93 Mr. BIGGS: Then to your Honor's charge—leaving to the jury to say whether the car left too near the track was an act of negligence. You should have instructed them it was not.

And to your Honor's statement that only the negligence of the plaintiff that proximately contributed to the injury should go in mitigation of damages on the question of contributory negligence;

And otherwise in your charge upon submitting to the jury the question as to whether the deceased was guilty of contributory negligence under the facts of the case. I think you should have instructed them he was guilty of contributory negligence.

And I except to your giving the charge there as requested by the plaintiff that you just read.

And also, your Honor, in summing up the facts which the jury should take into consideration in arriving at the amount of the verdict which they should render, if they should render any verdict, should also have stated to the jury that they would take into consideration Mr. Wright's employment, the fact that he was a railroad engineer, and that it was a hazardous occupation.

The COURT: Gentlemen of the jury, I did not intend by any reference to any of the facts I stated, to exclude from you any fact that was testified to, and in determining the questions, or any questions in the case, all the evidence that is before you will be taken into consideration by you. The fact that this deceased was an experienced railroad man, and had been so for twelve years, had been in the employ of railroad companies for seventeen years, possibly, will be taken into consideration in determining whether or not he was guilty of negligence.

Mr. BIGGS: I mean this, Your Honor, too. That the fact he was in a hazardous occupation should be looked to by the jury in estimating his life expectancy, when they went to arriving at his damages.

The COURT: I decline that last proposition.

Mr. BIGGS: And then to the special requests which I have handed in to your Honor, I note an exception to each and every one of them.

The COURT (Reading from defendant's special request): "The court further charges the jury that if the plaintiff's intestate failed

to exercise ordinary care and caution and that such want of care and caution on his part directly and proximately contributed to produce the injury, and that the defendant's negligence, if any, only remotely contributed to such injury, then your verdict should be in favor of the defendant; and also, if you find that the de-
94 ceased's negligence proximately contributed to the injury, however slight it may be, still that would go in mitigation of the damages he would otherwise be entitled to recover.

Mr. Biggs: And on the questions of the assumption of risk, as your Honor charged, I also except.

The Court: Now, gentlemen, you may retire and consider of your verdict.

Thereupon the defendant, in writing, requested the court to charge the jury further, as follows:

(1.)

"I charge you to return a verdict in favor of the defendant, the Yazoo & Mississippi Valley Railroad Company."

(Declined.)

Which request was by the court refused and denied.

To which action of the court the defendant then and there excepted.

Thereupon the defendant, in writing, requested the court to charge the jury further, as follows:

(4.)

"I charge you that the plaintiff's intestate D. C. Wright, was injured by reason of a collision between his train drawn by engine No. 495, striking certain cars in the yards at Gwin, Mississippi, which resulted in the death of the said D. C. Wright under the following circumstances:

"The train of which Wright was the engineman had pulled into Gwin, Mississippi, and had left the main track of the railroad company, and had entered upon a lead or switch track; that in order to ro this, it was necessary for the crew of the train of which Wright was an engineer, to throw a switch in order for a certain train to go in upon said siding; that after said switch had been thrown, the train had passed in upon said siding and the switch was then closed behind this train and proceeding along the said siding, the accident happened by the collision of the engine No. 495, operated at the time by the plaintiff's intestate D. C. Wright, striking against cars standing upon a switch track, and so close to, or projecting on the track upon which Wright's train was moving as that Wright's engine struck the said cars, causing a collision which resulted in his injuries and death.

"I further charge you that by virtue of his employment, this accident was one of the ordinary risks of the service, that is to say, under the rules of the company, enginemen and trainmen were notified that when entering or moving through sidings or yard-

tracks, they must expect to find them occupied, and as this
95 accident resulted from the occupancy of yard-tracks by other cars, it was one of the assumed risks incident to the employment of Wright, and, therefore, the plaintiff's intestate is not entitled to recover in this cause, and your verdict should be for the defendant, the Yazoo & Mississippi Valley Railroad Company.

(Declined.)

Which request was by the court refused and denied.

To which action of the court the defendant then and there excepted.

Thereupon the defendant, in writing, requested the court to charge the jury further, as follows:

VI.

"If you find from the proof that the plaintiff's intestate, D. C. Wright, for whose death this suit is brought, was an experienced railroad man, and that by virtue of his employment as such he was acquainted with the manner and method in which trains moved in the yards of the company at Gwin, Mississippi, and further find from the facts that under the rules of the company and the method of transacting its business, that trains moving on sidings or in the yards of the company, did so expecting to find the sidings or yard switches occupied or obstructed, and you further find that the injury and death of the said D. C. Wright was brought about by the collision of the engine of Wright's train with other cars, wholly or partially occupying or obstructing the track along which Wright's engine was passing, then I charge you that there can be no recovery in this case, because the said D. C. Wright, by virtue of his employment, assumed the risk incident to a collision of his train with cars upon or occupying or obstructing the tracks in the yards of the company. And your verdict, if you find the facts as I have stated them, should be for the defendant, The Yazoo & Mississippi Valley Railroad Company."

(Declined.)

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

Thereupon the defendant, in writing, requested the court to charge the jury further, as follows:

VII.

"If you find from the proof that the plaintiff's intestate was an experienced railroad man, that he was furnished with a book of rules of the company, that among such rules was rule No. 523, to-wit: 'Trains and engines must be run with caution when entering or moving through sidings or yard tracks, expecting to find them
96 occupied.' And you further find that, after entering the yards and passing upon a siding or lead track, his engine in passing by another track, known as the scale track, struck cars standing on said scale track, and which were so close to the track upon

which his engine was moving as that the engine could not pass said cars without striking it, and you further find that the deceased, D. C. Wright, was acquainted with the danger incident to passing cars in the condition that these cars were in; that he knew their situation and his attention had been directed to them, and that his death resulted from his engine being struck by the said cars, then I charge you that there can be no recovery in this case, because the said D. C. Wright assumed the said risks incident to the same, and your verdicts, if you find as I have stated, should be for the defendant, The Yazoo & Mississippi Valley Railroad Company.

(Declined.)

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

Thereupon the defendant, in writing, requested the court to charge the jury further, as follows:

VIII.

"I charge you that it is not sufficient in order for the plaintiff to recover in this case to prove that the deceased was injured and met death as a result of his engine colliding with cars upon a switch track, or the scale track, while his engine was moving along the lead track, or some other siding in the same railroad yards.

"The mere fact of the injury and the further fact that the cars which struck this engine were left too close to the track on which Wright's engine was moving are not in themselves proof of negligence upon the part of the railroad company, and if the proof goes no further than I have indicated, you should return a verdict in favor of the defendant.

(Declined.)

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

Thereupon the defendant, in writing, requested the court to charge the jury further, as follows:

IX.

"Recovery in this case is sought under the provisions of what is known as "The Employer's Liability Act," enacted by the Congress of the United States, and approved April 22, 1898 (1908),

97 I charge you that the effect of the said act is not to interfere with the rule existing at common law upon the question of the assumption of risks as that doctrine applies in this case. In other words, the only effect of that statute was to abolish the assumption of risks of employment in any case where violation by such common carrier of a statute enacted for the safety of employes contributed to the injury or death of such employe. Therefore, I charge you that the said act does not affect the doctrine of assumption of risks as it applies in this case growing out of the movement of cars or trains in the company's yards, the occupying, blocking or obstructing sidings, switches or other tracks than the

main line tracks in the yards of the company, and that if the plaintiff was injured by projecting, and he was so injured, and he saw them, or his attention was called to them, that your verdict must be for the defendant.

(Declined.)

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

Thereupon the defendant, in writing, requested the court to charge the jury further, as follows:

X.

"If you find from the proof that D. C. Wright was the engineer in charge of an extra freight train, and that said train entered the yards of the company at Gwin, and if the said Wright, attempting to pass by cars upon the side track, or scale track, the collision occurred which resulted in his injury and death, and you further find that the said Wright knew, or by the exercise of ordinary care could have discovered, that the said cars on the side or scale track were within striking distance of the engine, or if he was warned or advised that his engine could not pass said cars without striking them, and you further find that he undertook to pass said cars, then I charge you that he assumed the risk of safely passing the said cars and if he was injured as a result thereof, there can be no recovery by the plaintiff in this case, and your verdict should be for the defendant.

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

Thereupon the defendant, in writing, requested the court to charge the jury further, as follows:

XII.

"I charge you that it is not an act of negligence for the railroad company to occupy with trains or cars, in whole or in part, its sidings, switch tracks, lead tracks, scale tracks, or other tracks within the company's yards, and proof of the occupancy of such tracks does not constitute negligence on the part of the railroad company."

(Declined)

Which request was by the court declined and refused.

To which action of the court the defendant then and there excepted.

Thereupon the defendant, in writing, requested the court to charge the jury further, as follows:

XIII.

"If you find from the proof that Wright was advised by the fireman, or by the head brakeman, or by anyone else that the cars

standing upon the scale track did not clear the track upon which his train was moving, or, if you find that Wright had been on the lookout ahead and saw the cars, or by reasonable diligence could have seen them, and you further find that his train was not under control, so that it could be stopped after being so advised, or, after he discovered that the cars would strike or would not clear, then I charge you that he was guilty of contributory negligence proximately contributing to his injury, and if you find that the company was also guilty of some other act of negligence, then it is your duty to diminish the damages in proportion to the amount of negligence attributable to Wright.

Which request was by the court declined and refused.

To which action of the court the defendant then and there excepted.

Thereupon the defendant, in writing, requested the court to charge the further, as follows:

XIV.

"If you find from the proof that had Wright remained on the engineer's side of the engine he would not have been injured, but that his injury was proximately caused by leaving his side and watching on the fireman's side, that I charge you that he was guilty of gross contributory negligence and that the amount of damages which otherwise he would be entitled to recover (if the company was guilty of some other negligence than the negligence of Wright, as I have heretofore instructed you) shall be diminished in proportion to the above, or any other negligent acts of Wright which contributed to his injury."

(Declined)

Which request was by the court declined and refused.

To which action of the court the defendant then and there excepted.

99 Thereupon the defendant, in writing, requested the court to charge the jury further, as follows:

XIV A.

"The effect of the Employers' Liability Act is to introduce the rule of comparative negligence.

Now, in order for the plaintiff to recover, it is necessary for you to find from the proof that there is more than a mere preponderance of negligence upon the part of the railroad company, or its servants other than the negligence of Wright. In other words, if you find from the proof that the negligence of the railroad company was slight, and the negligence of Wright was great, plaintiff in this suit cannot recover. On the other hand, if you should hold that the plaintiff was guilty of slight negligence, or that the negligence of the plaintiff compared to the negligence of the defendant was slight, then the plaintiff would be entitled to recover some amount proportioned as to the negligence of the plaintiff compared

with the negligence of the defendant, but mere preponderance of negligence on the part of the defendant over that of the plaintiff will not authorize the plaintiff to recover."

(Declined)

Which request was by the court declined and refused.

To which action of the court the defendant then and there excepted.

Thereupon the defendant, in writing, requested the court to charge the jury further, as follows:

XV.

"The court charges the jury that if you find for the plaintiff and further find that the plaintiff's intestate was guilty of any negligence, however slight, which contributed in any degree to bring about the accident, such negligence must go in reduction of damage in the proportion that such negligence bears to the negligence of the defendant, as proven."

(Declined)

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

Thereupon the defendant, in writing, requested the court to charge the jury further, as follows:

XVI.

"The court charges the jury that if you find for the plaintiff, and also find that the plaintiff's intestate was guilty of any negligence whatsoever, which contributed to the injury, whether such negligence was the proximate cause of the injury or not, then such negligence on the part of the plaintiff, however slight, must
100 go in reduction of his damage in the proportion that such negligence bears to the negligence of the defendant."

(Declined)

Which request was by the court refused and declined.

To which action of the court the defendant by counsel then and there excepted.

Thereupon the defendant, in writing, requested the court to charge the jury further, as follows:

XVIII.

The court further charges the jury that if you find that the plaintiff's intestate and those handling the cut of cars with which the engine collided both had equal opportunity for avoiding the accident, no question on apportionment of damages arises, and there can be no recovery."

(Declined)

Which request was by the court refused and declined.

To which action of the court the defendant by counsel then and there excepted.

Thereupon the defendant, in writing, requested the court to charge the jury further, as follows:

XVIII A.

"I charge you that a car left too near the track is not a defect in the company's ways or right of way."

(Declined)

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

Thereupon the defendant, in writing, requested the court to charge the jury further, as follows:

XIX.

"I charge you that in this case you can only return a verdict for nominal damages, and by nominal damages, I mean five dollars, ten dollars, twenty dollars or some such amount."

(Declined)

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

Thereupon the jury retired to the jury room, and after considering of the case they returned their verdict in open court, which said verdict, being in writing and signed by the foreman, is in the following words and figures, to-wit:

"We, the jury, find — the plaintiff against the defendant, and assess the damages at nineteen thousand ($19,000) dollars."

To which *the* verdict the defendant duly excepted.

101 Thereupon the defendant moved the court for a new trial, its motion being in writing and filed on February 6th, 1912, the said motion being in the following words and figures, to-wit:

In the District Court of the United States, Western District of Tennessee, Western Division.

No. 4151, C. C.

Mrs. Ada R. Wright, Adm'x D. C. Wright,
vs.
Yazoo & Mississippi Valley Railroad Company.

Defendant's Motion for a New Trial.

Filed February 6th, 1912. A. G. Mathews, Clerk.

Comes the Yazoo & Mississippi Valley Railroad Company and moves the Court for a new trial, and for grounds of motion says:

I.

There is no evidence to support the verdict.

II.

The verdict is contrary to the law and the evidence.

III.

For the error of the court in declining to give peremptory instruction in favor of the defendant as requested by it at the close of the plaintiff's proof.

IV.

For the error of the court in declining to give a peremptory instruction in favor of the defendant at the close of all of the proof.

V.

For the error of the court in declining to permit the examination of the witnesses, Walsh, Dubbs and Love to show the frequent occupancy and blocking of tracks within railroad terminals and yards, known to all railroad men, to all of which, exceptions were duly noted at the time.

VI.

For the error of the court in submitting to the jury as to whether it was negligence for a car to be on a siding in a railroad yard not clearing adjoining tracks.

VII.

For the error of the court in charging the jury that only the proximate contributory negligence of the deceased would be considered in mitigation of damages.

VII A.

Because the court submitted to the jury the question of contributory negligence of Wright, when he should have charged the jury that Wright was guilty of contributory negligence.

102

VIII.

For the error of the court in declining to submit to the jury the question of assumption of risks.

IX.

For the error of the court in declining to charge as requested by the defendant as follows:

"4.

"I charge you that the plaintiff's intestate, D. C. Wright, was injured by a reason of a collision between his train drawn by engine No. 495, striking certain cars in the yards at Gwin, Mississippi, which resulted in the death of the said D. C. Wright under the following circumstances:

"The train of which Wright was the engineman had pulled into Gwin, Mississippi, and had left the main track of the railroad company, and had entered upon a lead or switch track; that in order to do this, it was necessary for the crew of the train of which Wright was an engineer, to throw a switch in order for a certain train to go in upon said siding; that after said switch had been thrown, the train had passed in upon said siding and the switch was then closed behind this train and proceeding along the said siding, the accident happened by the collision of the engine No. 495, operated at the time by the plaintiff's intestate, D. C. Wright, striking against cars standing upon a switch track, and so close to, or projecting on the track upon which Wright's train was moving as that Wright's engine struck the said cars, causing a collision which resulted in his injuries and death.

"I further charge you that by virtue of his employment, this accident was one of the ordinary risks of the service, that is to say, under the rules of the company, enginemen and trainmen were notified that when entering or moving through sidings or yard-tracks, they must expect to find them occupied, and as this accident resulted from the occupancy of yard-tracks by other cars, it was one of the assumed risks incident to the employment of Wright, and, therefore, the plaintiff's intestate is not entitled to recover in this cause, and your verdict should be for the defendant, the Yazoo & Mississippi Valley Railroad Company.

(Declined.)

Which request was by the court refused and denied.

To which action of the court the defendant then and there excepted.

X.

For the error of the court in declining to charge as requested by the defendant as follows:

103 "VI.

If you find from the proof that the plaintiff's intestate, D. C. Wright, for whose death this suit is brought, was an experienced railroad man, and that by virtue of his employment as such he was acquainted with the manner and method in which trains moved in yards of the company at Gwin, Mississippi, and you further find from the facts that under the rules of the company and the method of transacting its business, that trains moving on sidings or in the yards of the company, did so expecting to find the sidings or switches occupied or obstructed, and you further find that the injury and death of the said D. C. Wright was brought about by the col-

lision of the engine of Wright's train with other cars, wholly or partially occupying or obstructing the track along which Wright's engine was passing, then I charge you that there can be no recovery in this case, because the said D. C. Wright, by virtue of his employment, assumed the risk incident to a collision of his train with cars upon or occupying or obstructing the tracks in the yards of the company. And your verdict, if you find the facts as I have stated them, should be for the defendant, the Yazoo & Mississippi Valley Railroad Company.

(Declined.)

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

XI.

For the error of the court in declining to charge as requested by the defendant as follows:

"VII.

"If you find from the proof that the plaintiff's intestate was an experienced railroad man, that he was furnished with a book of rules of the company, that among such rules was rule No. 523, to-wit: 'Trains and engines must be run with caution when entering or moving through sidings or yard tracks, expecting to find them occupied.' And you further find that, after entering the yards and passing upon a siding or lead track, his engine in passing by another track, known as the scale track, struck cars standing on said scale track, and which were so close to the track upon which his engine was moving as that the engine could not pass said cars without striking it, and you further find that the deceased, D. C. Wright, was acquainted with the danger incident to passing cars in the condition that these cars were in; that he knew their situation and his attention had been directed to them, and that his death resulted from his engine being struck by the said cars then I charge
104 you that there can be no recovery, in this case, because the said D. C. Wright assumed the said risks incident to the same, and your verdicts, if you find as I have stated, should be for the defendant, the Yazoo & Mississippi Valley Railroad Company.

(Declined.)"

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

XII.

For the error of the court in declining to charge as requested by the defendant as follows:

"VIII.

"I charge you that it is not sufficient in order for the plaintiff to recover in this case to prove that the deceased was injured and met his death as a result of his engine colliding with cars upon a switch

track, or the scale track, while his engine was moving along the lead track, or some other siding in the same railroad yards.

"The mere fact of the injury and the further fact that the cars which struck this engine were left too close to the track on which Wright's engine was moving are not in themselves proof of negligence upon the part of the railroad company, and if the proof goes no further than I have indicated, you should return a verdict in favor of the defendant.

(Declined.)"

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

XIII.

For the error of the court in declining to charge as requested by the defendant as follows:

"IX.

"Recovery in this case is sought under the provisions of what is known as "The Employer's Liability Act," enacted by the Congress of the United States, and approved April 23rd, 1898-(1908).

"I charge you that the effect of the said act is not to interfere with the rule existing at common law upon the question of the assumption of risks as the doctrine applies in this case. In other words, the only effect of that statute was to abolish the assumption of risks of employment in any case where violation by such common carrier of a statute enacted for the safety of employers contributed to the injury or death of such employe. Therefore, I charge you that the said act does not affect the doctrine of assumption of risks as it applies in this case growing out of the movement of cars or
105 trains in the company's yards the occupying, blocking or obstructing sidings, switches or other tracks than the main line tracks in the yards of the company, and that if the plaintiff was injured by projecting, and he was so injured, and he saw them, or his attention was called to them, that your verdict must be for the defendant.

(Declined.)"

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

XIV.

For the error of the court in declining to charge as requested by the defendant as follows:

X.

"If you find from the proof that D. C. Wright was the engineer in charge of an extra freight train, and that said train entered the yards of the company at Gwin, and if the said Wright, attempting to pass by cars upon a side track, or scale track, the collision occurred which resulted in his injury and death, and you further find that the said Wright knew, or by the exercise of ordinary care could have

discovered, that the said cars on the side or scale track were within striking distance of the engine, or if he was warned or advised that his engine could not pass said cars without striking them, and you further find that he undertook to pass said cars, then I charge you that he assumed the risk of safely passing the said cars and if he was injured as a result thereof, there can be no recovery by the plaintiff in this case, and your verdict should be for the defendant."

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

XV.

For the error of the court in declining to charge as requested by the defendant as follows:

"XII.

"I charge you that it is not an act of negligence for the railroad company to occupy with trains or cars, in whole or in part, its sidings, switch tracks, load tracks, scale tracks or other tracks within the company's yards, and proof of the occupancy of such tracks does not constitute negligence on the part of the railroad company. (Declined.)"

Which request was by the court declined and refused.

To which action of the court the defendant then and there excepted.

XVI.

For the error of the court in declining to charge as requested by the defendant as follows:

106 "XIII.

"If you find from the proof that Wright was advised by the fireman, or by the head brakeman, or by anyone else that the cars standing upon the scale track did not clear the track upon which his train was moving, or, if you find that Wright had been on the lookout ahead and saw the cars, or by reasonable diligence could have seen them, and you further find that his train was not under control, so that it could be stopped after being so advised, or, after he discovered that the cars would strike, or would not clear, then I charge you that he was guilty of contributory negligence proximately contributing to his injury, and if you find that the company was also guilty of some other act of negligence, then it is your duty to diminish the damages in proportion to the amount of negligence attributable to Wright."

Which request was by the court declined and refused.

To which action of the court the defendant then and there excepted.

XVII.

For the error of the court in declining to charge as requested by the defendant as follows:

"XIV.

"If you find from the proof that had Wright remained on the engineer's side of the engine he would not have been injured but that his injury was proximately caused by leaving his side and watching on the fireman's side, then I charge you that he was guilty of gross contributory negligence and that the amount of damages which otherwise he would be entitled to recover (if the company was guilty of some other negligence than the negligence of Wright, as I have heretofore instructed you), shall be diminished in proportion to the above, or any other negligent acts of Wright which contributed to his injury."

Which request was by the court declined and refused.

To which action of the court the defendant then and there excepted.

XVIII.

For the error of the court in declining to charge as requested by the defendant as follows:

"XIV. A.

"The effect of the Employer's Liability Act is to introduce the rule of comparative negligence.

"Now, in order for the plaintiff to recover, it is necessary for you to find from the proof that there is more than a mere preponderance of negligence upon the part of the railroad company, or its
107 servants other than the negligence of Wright. In other words, if you find from the proof that the negligence of the railroad company was slight, and the negligence of Wright was great, plaintiff in this suit cannot recover. On the other hand, if you should hold that the plaintiff was guilty of slight negligence, or that the negligence of the plaintiff compared to the negligence of the defendant was slight, then the plaintiff would be entitled to recover some amount proportioned as to the negligence of the plaintiff compared to the negligence of the defendant, but mere preponderance of negligence on the part of the defendant over that of th plaintiff will not authorize the plaintiff to recover."

(Declined.)

Which request was by the court declined and refused.

To which action of the court the defendant then and there excepted.

XIX.

For the error of the court in declining to charge as requested by the defendant as follows:

"XV.

"The court charges the jury that if you find for the plaintiff and further find that the plaintiffs intestate was guilty of any negligence, however, slight, which contributed in any degree to bring about the accident, such negligence must go in reduction of damage in the pro-

portion that such negligence bears to the negligence of the defendant, as proven."

(Declined.)

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

XX.

For the error of the court in declining to charge as requested by the defendant as follows:

"XVI.

"The court charges the jury that if you find for the plaintiff, and also find that the plaintiff's intestate was guilty of any negligence whatsoever which contributed to the injury, whether such negligence was the proximate cause of the injury or not, then such negligence on the part of the plaintiff, however slight, must go in reduction of his damage in the proportion that such negligence bears to the negligence of the defendant."

(Declined.)

Which request was by the court refused and declined.

To which action of the court the defendant by counsel then and there excepted.

108 XXI.

For the error of the court in declining to charge as requested by the defendants as follows:

"XVIII.

"The court further charges the jury if you find that the plaintiff's intestate and those handling the cut of cars with which the engine collided both had equal opportunity for avoiding the accident, no question on apportionment of damages arises, and there can be no recovery."

(Declined.)

Which request was by the court refused and declined.

To which action of the court the defendant by counsel then and there excepted.

XXII.

For the error of the court in declining to charge as requested by the defendant as follows:

"XVIII-A.

"I charge you that a car left too near the track is not a defect in the company's ways or right of way."

(Declined.)

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

XXIII.

For the error of the court in declining to charge as requested by the defendant as follows:

"I charge you that in this case you can only return a verdict for nominal damages, and by nominal damages, I mean five dollars, ten dollars, twenty dollars, or some such amount."

(Declined.)

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

XXIV.

Because the damages are excessive, evincing, passion prejudice and caprice on the part of the jury.

Wherefore, the defendant prays the court to grant it a new trial.

FITZHUGH & BIGGS,
Attorneys for Defendants.

After argument of said motion and consideration of same by the court, the court overruled the same, filing at the same time the following written opinion, to-wit:

109 "This case is before me upon a motion for a new trial.

Twenty-four grounds are assigned as a basis for the motion. All of them may be overruled without comment, except the eight- and twenty-fourth assignments.

The case was heard and submitted to the jury under the Federal Employers' Liability Act. As far as need be quoted here that act provides:

That every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his of her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employers of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

* * * * * * *

That * * * the fact that the employee may have been guilty of contributory negligence, shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of the negligence attributable to such employee; provided, that no such employee * * * shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributes to the injury or death of such employé.

That * * * such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carriers of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The facts are that the defendant left a cut of cars standing on a side track at Gwin, Mississippi, not "in the clear" of a lead track, and the deceased engineer, who was proceeding along the lead track with his engine and train, and had approached too close to said cut of cars before he attempted to stop his train, that when he discovered he could not clear it, he was unable to stop his engine before it collided with the cut of cars, resulting in his death.

The specific question raised by the assignment is whether or not the deceased engineer, while running his engine into the yards of the defendant at Gwin Mississippi, assumed, by his contract of employment, the risk and danger incident to the negligently leaving by the defendant of a cut of cars not "in the clear" of the
110 track on which the deceased's engine was moving. Or, in other words, leaving a cut of cars near enough to the track on which the deceased's engine was moving so as to be struck by the engine in passing.

It requires no argument to convince me that the defendant was guilty of negligence in leaving a cut of cars within striking distance of a train moving on the track on which the deceased's engine was proceeding, and for two reasons: First, the rules of the defendant company require of its servants that they shall place the cars on the sidings in the clear. This rule is a safe and reasonable one, and it was negligence to violate it. Second, if there were no such rule of the company, it would be negligence to place and leave a cut of cars so that it would be within striking distance of a train moving over an adjacent track in the manner the evidence shows was done in this case.

Nor is there room for doubt that the negligently placing and leaving of this cut of cars as the evidence shows was done, caused, or proximately contributed to the death of the deceased, and the defendant, being engaged in interstate commerce, is liable under the Employers' Liability Act, unless it may escape liability under the doctrine of assumption of risk.

Before the passage of the act above quoted, one of the defenses to cases of this character was contributory negligence in bar of right of action. The act abolishes that defense as a bar, and requires that the negligence of the servant go in reduction of damages.

If the contention that the doctrine of assumed risk is available in this case, as is so ably insisted, then it would seem that the purpose of the act would be defeated, for it, in such event, will have only caused the substitution of the defense of assumption of risk for that of contributory negligence.

While it is not always easy to discern between assumption of risk and contributory negligence, yet there is a clear distinction.

Mr. Justice Holmes, speaking for the court in Schlemmer vs. Railroad Co., 220 U. S. 595, defines each of these doctrines as follows:

"While * * * assumption of risk sometimes shades into negligence as commonly understood, there is, nevertheless, a practical and clear distinction between the two. In the absence of statute taking away the defense, or such obvious dangers that no ordinarily prudent person would incur them, an employee is held to assume the risk of ordinary dangers of the occupation into which he
111 is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employee may be presumed to know of them, and if he continues in the master's employ without objection, he takes upon himself the risk of injury from such defects.

"Contributory negligence, on the other hand, is the omission of the employé to use those precautions for his own safety which ordinary prudence requires."

Taking these announcements of the two doctrines to be correct, as we must, which one, if either, applies to this case? Certainly it could not be that of assumed risk, for it could not be said that one of the ordinary dangers of deceased's occupation was the fact that the carrier violated its own rule, requiring that cars left on sidings at Gwin be placed in the clear, so habitually that the servant knew of it, and by remaining in the service of the company would be held to have assumed the risk incident thereto; or that such conduct was so plainly observable that he must be presumed to have known that the cut of cars in question would not be left in the clear. Certainly in the face of a rule to the contrary, it should not be said that the leaving of cars not in the clear, as was done in this case, was so habitual as to have become one of the customs of the defendant road, and has become one of the ordinary dangers to which the employees of the road are subject and which they assume on taking employment.

What was the purpose of Congress in passing the Employers' Liability Act?

If plain words are to be taken in their ordinary meaning, it was to make common carriers liable for injuries or death inflicted upon their servants because of any negligence of their officers, agents or employés, etc.

It is conceded that the rule that contributory negligence barred the right of action has been abolished by the act. Shall the courts destroy the effect of the act in abolishing this rule by construing the act so as to hold that common carriers are not liable to its servants for injury or death inflicted because of the negligence of their officers, agents or employés, upon the ground that the servant assumes the dangers incident to the negligence of the officers, agents or employés, of the carrier?

To so hold, would, in my opinion, defeat in a very large measure the purpose of this act.

The Court declined, therefore, to instruct the jury on the law of the assumption of risk, first, because under the evidence it would not have been applicable had the case been brought under the common law. Second, the Employers' Liability Act, in my opin-
112 ion, abolishes the rule that the servant assumes the risk of his employment incident to the negligence of officers, agents and employés of the carrier.

Passing to the twenty-fourth assignment, which is, that the amount of the verdict of the jury is so excessive as to evince passion, prejudice and caprice on the part of the jury.

I am not prepared to say that this verdict is excessive if the deceased were not guilty of contributory negligence. The amount of this verdict indicates that the jury found that he was not guilty of contributory negligence, or, if it so found, it has not made such negligence effective in reducing the damages as the law provides must be done.

From this evidence, in my opinion, the deceased was culpable, and failed to exercise that care and caution which the law requires of a prudent person.

He was doubtful about being able to clear the cut of cars when he first saw it, and all he did was to inquire of the fireman and flagman if he could clear. He was informed that he could not, but too late to stop his train and avoid the collision. Had he observed the rule of the company, that when in danger, take the safe course, he probably would be alive today. He should have stopped his train or put it under complete control when he first saw the cars and the question arose in his mind as to his ability to clear them, and have investigated the situation. He did not do so, but proceeded with his train until he reached a point so near the cars that it was then impossible to stop and avoid a collision. He lost his life, for which he was not blameless.

The jury should have reduced the amount of damages because of the contributory negligence upon the part of the deceased.

I think this verdict should be reduced to ten thousand ($10,000) dollars.

Upon the plaintiff entering a remittitur for nine thousand ($9,000) dollars, the motion for a new trial will be overruled; if not, then the verdict will be set aside and a new trial awarded upon the ground that it is excessive.

An order will be entered accordingly.

(Signed) McCALL, *Judge.*"

To the action of the court in overruling this motion for a new trial the defendant, The Yazoo & Mississippi Valley Railroad Company, duly and regularly excepted, and its exceptions were noted of record.

To the action of the court aforesaid, it presents this, its bill of exceptions, which, having been examined by the court, is
113 approved, and thereupon, on motion of the defendant, the said bill of exceptions is signed and sealed by the court and ordered to be filed by the clerk and made a part of the record herein. Done this the 15th day of March, 1912.

JNO. E. McCALL,
Judge of the United States District Court
for the Western District of Tennessee.

In the District Court of the United States, Western District of Tennessee, Western Division.

No. 4151.

Mrs. ADA R. WRIGHT, Adm'x D. C. Wright, Deceased,
vs.
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Petition for Writ of Error.

Filed March 22nd, 1912. A. G. Mathews, Clerk.

And now comes the Yazoo & Mississippi Valley Railroad Company, the defendant herein, and says that on the fourth day of March, 1912, this Court entered a judgment herein in favor of the plaintiff, Mrs. Ada R. Wright, Adm'x, and against this defendant, The Yazoo & Mississippi Valley Railroad Company, on the verdict of a jury for the sum of Ten Thousand Dollars as of date January 27th, 1912, in which judgment, and the proceedings had prior thereto in this cause, certain errors were committed, to the prejudice of this defendant, all of which will, in more detail, appear from the assignment of error which is filed with this petition.

Wherefore, this defendant, The Yazoo & Mississippi Valley Railroad Company prays that a Writ of Error may issue in its behalf out of the United States Circuit Court of Appeals for the Sixth Circuit for the correction of the errors so complained of, and that the transcript of the record proceedings and papers and bill of exceptions in this cause, duly authenticated may be sent to the said Circuit Court of Appeals, and that upon bond being executed, as required by law, that the same may operate as a supersedeas.

THE YAZOO & MISSISSIPPI VALLEY R. R. CO.,
By ALBERT W. BIGGS, *Attorney.*

114 In the District Court of the United States, Western District of Tennessee, Western Division.

No. 4151, C. C.

Mrs. ADA R. WRIGHT, Administratrix of D. C. Wright, Deceased,
vs.
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Assignment of Error.

Filed March 22nd, 1912. A. G. Mathews, Clerk.

The defendant in this action, The Yazoo & Mississippi Valley Railroad Company, in connection with its petition for a Writ of

Error makes the following Assignments of Error, which it avers occurred upon the trial of the cause, to-wit:

I.

The court erred in declining to give a peremptory instruction in favor of the defendant at the close of all the proof as requested by it at the time.

II.

The court erred in holding that the Federal Employer's Liability Act abrogated the doctrine of Assumption of risk by an employe other than that growing out of the violation by the defendant of a statute enacted for the safety of employés, and in denying to the defendant the benefit of the defense of assumption of risk as a defense to this action.

III.

The proof shows that the plaintiff's interstate was an experienced railroad man who had been running a train two or three times a week into the company's yards at Gwin, Mississippi, and this suit is founded upon the alleged negligence of the railroad company in permitting a car standing upon the scale track in the company's yard at Gwin, Mississippi, to protrude over so as to obstruct the lead track on which the train (of which the deceased was an engineer) was moving, and that the deceased met his death as a result of the collision between the protruding car and the engine of his train.

The proof shows that the leaving of cars in this manner was frequent and unavoidable in the operation of railroad yards, especially the yards at Gwin, with which the deceased was acquainted, and in the instant case the fact that the car was protruding over and obstructing the track along which his train was moving was known to the deceased, who, instead of stopping the train undertook to run by the obstruction, thereby causing a collision between his engine and the car resulting in his death. He therefore assumed this risk and the plaintiff is not entitled to recover.

115 The court erred in denying the defendant the benefit of the defense assumption of risk, as follows:

(*a*) The error of the court in overruling the motion for a peremptory instruction made on behalf of the defendant at the close of plaintiff's proof, to which the defendant duly excepted. In overruling this motion the court said:

The COURT: I think this act passed by congress abolishes the doctrine of assumption of risk in cases where the accident is caused by or proximately contributed to by the negligence of the carrier.

Mr. BIGGS: My idea is, that the act of congress doesn't affect the doctrine of assumption of risk in a case of this kind, under the decision of the Supreme Court.

The COURT: I understand, if there is negligence on the part of the company, he doesn't assume the risk, as I construe it. Your motion presents that question. Call your first witness.

To which ruling the defendant excepted.

(*b*) The error of the court in declining to give a motion for peremptory instruction made by the defendant at the close of the proof as follows:

Motion for Peremptory Instruction for the Defendant Renewed.

Mr. BIGGS: Before we start on the argument, if your Honor please, I desire to renew the motion which I made at the close of the Plaintiff's proof.

I move your Honor to direct a verdict for the defendant, Yazoo & Mississippi Valley Railroad Company, on the grounds:

1. That there has been no negligence shown on the part of the defendant.

2 That the obstruction of the car would not be a defect within the meaning of the employer's liability Act.

3. That, upon the proof introduced by both plaintiff and defendant, the plaintiff assumed the risk of injury by reason of the occupation or obstruction, in whole or in part, of the tracks, switches, or sidings, while in yards.

4. Also on additional ground that the plaintiff's intestate is shown by the proof to have known the proximity of the cars to the track, and assumed the risk in going by them.

After argument upon the motion, the Court overruled the same, and all the grounds thereof, to which action and ruling of the Court, upon each of the grounds of said motion, the defendant, Yazoo & Mississippi Valley Railroad Company then and there duly excepted."

116 (*c*) The error of the court in charging the jury as follows:

"In the view that I have taken of the law as to the third plea, I do not think it proper to charge the jury upon the question raised, that is, the assumption of risk. But I submit this case to you upon the negligence of the defendant company, in the first place, if any has been shown by the proof, and in the second place, the negligence of the deceased, if any has been shown."

To which the defendant entered due exception.

(*d*) For the error of the court in declining to charge the jury as requested by the defendant as follows:

"I charge you that the plaintiff's intestate, D. C. Wright, was injured by reason of a collision between his train drawn by engine No. 495, striking certain cars in the yards at Gwin, Mississippi, which resulted in the death of the said D. C. Wright under the following circumstances:

"The train of which Wright was the engineer had pulled into Gwin, Mississippi, and has left the main track of the railroad company, and had entered upon a lead or switch track; that in order to do this, it was necessary for the crew of the train of which Wright was an engineer, to throw a switch in order for a certain train to go in upon said siding; that after said switch has been thrown, the train had passed in upon said siding and the switch was then closed

behind this train and proceeding along the said siding, the accident happened by the collision of the engine No. 495, operated at the time by the plaintiff's intestate, D. C. Wright, striking against cars standing upon a switch track, and so close to, or projecting on the track upon which Wright's train was moving as that Wright's engine struck the said cars, causing a collision which resulted in his injuries and death.

"I further charge you that by virtue of his employment, this accident was one of the ordinary risks of the service, that is to say, under the rules of the company, enginemen and trainmen were notified that when entering or moving through sidings or yard tracks, they must expect to find them occupied and as this accident resulted from the occupancy of yard tracks by cars, it was one of the assumed risks incident to the employment of Wright, and, therefore, the plaintiff's intestate is not entitled to recover in this cause, and your verdict should be for the defendant, theYazoo & Mississippi Valley Railroad Company."

Which request was by the court refused and denied.

117 To which action of the court the defendant then and there excepted.

(5) For the error of the court in declining to charge as requested by the defendant as follows:

"If you find from the proof that the plaintiff's intestate, D. C. Wright, for whose death this suit is brought, was an experienced railroad man, and that by virtue of his employment as such he was acquainted with the manner and method in which trains moved in yards of the company at Gwin, Mississippi, and you further find from the facts that under the rules of the company and the method of transacting its business, that trains moving on sidings or in the yards of the company, did so expecting to find the sidings or yard switches occupied or obstructed, and you further find that the injury and death of the said D. C. Wright was brought about by the collision of the engine of Wright's train with other cars, wholly or partially occupying or obstructing the track along which Wright's engine was passing, then I charge you that there can be no recovery in this case, because the said D. C. Wright, by virtue of his employment, assumed the risk incident to a collision of his train with cars upon or occupying or obstructing the tracks in the yards of the company. And your verdict, if you find the facts as I have stated them, should be for the defendant, the Yazoo & Mississippi Railroad Company."

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

(*f*) For the error of the court in declining to charge as requested by the defendant as follows:

"If you find from the proof that the plaintiff's intestate was an experienced railroad man, that he was furnished with a book of rules of the company, that among such rules was rule No. 523, to-wit: 'Trains and engines must run with caution when entering or moving through sidings or yard tracks, expecting to find them

occupied.' And you further find that, after entering the yards and passing upon a siding or lead track, his engine in passing another track, known as the scale track, struck cars standing on said scale track, and which were so close to the track upon which his engine was moving as that the engine could not pass said car without striking *it*, and you further find that the deceased, D. C. Wright, was acquainted with the danger incident to passing cars in the condition that these cars were in; that he knew their situation and his attention had been directed to them, and that his death resulted from his engine being struck by the said cars, then
118 I charge you that there can be no recovery in this case, because the said D. C. Wright assumed the risks incident to the same, and your verdicts, if you find as I have stated, should be for the defendant, the Yazoo & Mississippi Valley Railroad Company."

(Declined.)

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

(*g*) For the error of the court in declining to charge as requested by the defendant as follows:

"Recovery in this case is sought under the provisions of what is known as 'The Employer's Liability Act,' enacted by the Congress of the United States, and approved April 22, 1898-(1908).

I charge you that the effect of the said act is not to interfere with the rule existing at common law upon the question of assumption of risk as that doctrine applies in this case. In other words, the only effect — that statute was to abolish the assumption of risks of employment in any case where violation by such common carrier of a statute enacted for the safety of employes contributed to the injury or death of such employe. Therefore, I charge you that the said act does not affect the doctrine of assumption of risks as it applies in this case growing out of the movement of cars or trains in the company's yards, the occupying, blocking or obstructing sidings, switches or other tracks than the main line tracks in the yards of the company, and that if the plaintiff was injured by projecting, and he was so injured, and he saw them, or his attention was called to them, that your verdict must be for the defendant.

(Declined.)

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

(*h*) For the error of the court in declining to charge as requested by the defendant as follows:

"If you find from the proof that D. C. Wright was the engineer in charge of an extra freight train, and that said train entered the yards of the company at Gwin, and if the said Wright, attempting to pass by cars upon a side track, or scale track, the collision occurred which resulted in his injury and death, and you further find that the said Wright knew, or by the exercise of ordinary care could

have discovered, that the said cars on the side or scale track were within striking distance of the engine, or if he was warned or advised that his engine could not pass said cars without striking them, and you further find that he undertook to pass said cars, then I charge you that he assumed the risk of safely passing the said cars and if he was injured as a result thereof, there can be no recovery by the plaintiff in this case, and your verdict should be for the defendant."

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

IV.

The court erred in holding that the deceased was not guilty of contributory negligence as a matter of law in leaving his side of the engine, the right hand side, and walking to the left hand side of the engine, where he was struck and killed. The proof showed that had he remained on his side of the engine he would not have been injured, for he was in a place of safety.

In this connection the court, during the re-examination of C. W. Johnson, said:

"I think the question is not very material here—what a man does in excitement at the moment of an accident; he cannot stop to think—to consider."

Mr. BIGGS: Well, I note an exception.

COURT: Yes.

Again an exception was noted to this as follows:

"Mr. BIGGS: I think that I excepted this morning when I was examining the fireman about the danger of going from the engineers side to his side, to the statement which your Honor made about an act of emergency

The COURT: That I made?

Mr. BIGGS: Yes, sir.

The COURT: I only asked the question.

Mr. BIGGS: It was in reply, as I caught it, to my statement.

The COURT: All right."

V.

Because of the error of the court in not instructing the jury that the deceased was guilty of contributory negligence as a matter of law in leaving the safe side of the engine, that is his own side, and going to the fireman's side of the engine, where he was struck and killed.

VI.

For the error of the court in charging the jury as follows:

"But assuming that you find that it was an act of negligence to leave the car there, and that it was standing so close that it was not in the clear of the track on which this train was moving, and that it proximately contributed to the accident, and that the plaintiff is entitled to a recovery, then your next consideration would be to determine whether or not the deceased him-

self was guilty of negligence. Upon that issue, the burden of proof is upon the defendant Railroad Company. It has plead that as one of its defenses, and it must establish by a preponderance of the evidence that that allegation of contributory negligence is true. The only effect that negligence on the part of the deceased can have is to reduce your verdict from what it would otherwise be in case there was no contributory negligence. Whatever contributory negligence you find him guilty of, that proximately contributed to the accident and his death will go in reduction of the amount of damages that this plaintiff would be otherwise entitled to recover in the proportion that you may find it to be to the negligence on the part of the company. That it to say, if the negligence of the company was great, and the negligence of the deceased was slight, although it contributed to the injury, why, it must go in reduction of his damages in that proportion. So you will get the idea that the negligence of the deceased must go in reduction of the damages that the plaintiff would otherwise be entitled to recover if there had been no negligence on the part of the deceased.

VII.

Because of the error of the court in declining to charge as requested by the defendant as follows:

"If you find from the proof that had Wright remained on the engineer's side of the engine he would not have been injured, but that his injury was proximately caused by leaving his side and watching on the fireman's side, then I charge you that he was guilty of gross contributory negligence and that the amount of damages which otherwise he would be entitled to recover (if the company was guilty of some other negligence than the negligence of Wright, as I have heretofore instructed you), shall be diminished in proportion to the above, or any other negligent acts of Wright which contributed to his injury.

Which request was by the court declined and refused.

To which action of the court the defendant then and there excepted.

(*b*) For the error of the court in declining to charge as requested by the defendant as follows:

"If you find from the proof that Wright was advised by the fireman, or by the head brakeman, or by any one else that the cars standing upon the scale track did not clear the track upon which his train was moving, or, if you find that Wright had been on
121 the lookout ahead and saw the cars, or by reasonable diligence could have seen them, and you further find that his train was not under control, so that it could be stopped after being so advised, or, after he discovered that the cars would strike, would not clear, then I charge you that he was guilty of contributory negligence proximately contributing to his injury, and if you find that the company was also guilty of some other act of negligence, then it is your duty to diminish the damages in proportion to the amount of negligence attributable to Wright."

Which request was by the court declined and refused.

To which action of the court the defendant then and there excepted.

VIII.

For the error of the court in declining to charge as requested by the defendant as follows:

(*a*) "The effect of the Employer's Liability Act is to introduce the rule of comparative negligence.

"Now, in order for the plaintiff to recover, it is necessary for you to find from the proof that there is more than a mere preponderance of negligence upon the part of the railroad company, or its servants other than the negligence of Wright. In other words, if you find from the proof that the negligence of the railroad company was slight, and the negligence of Wright was great, plaintiff in this suit cannot recover. On the other hand, if you should hold that the plaintiff was guilty of slight negligence, or that the negligence of the plaintiff compared to the negligence of the defendant was slight, then the plaintiff would be entitled to recover some amount proportioned as to the negligence of the plaintiff compared with the negligence of the defendant, but mere preponderance of negligence on the part of the defendant over that of the plaintiff will not authorize the plaintiff to recover.

Which request was by the court declined and refused.

To which action of the court the defendant then and there excepted.

(*b*) For the error of the court in declining to charge as requested by the defendant as follows:

"The court charges the jury that if you find for the plaintiff and further find that the plaintiff's intestate was guilty of any negligence, however slight, which contributed in any degree to bring about the accident, such negligence must go in reduction of damage in the proportion that such negligence bears to the negligence of the defendant, as proven."

(Declined.)

122 Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

(*c*) For the error of the court in declining to charge as requested by the defendant as follows:

"The court charges the jury that if you find for the plaintiff, and also find that the plaintiff's intestate was guilty of any negligence whatsoever which contributed to the injury, whether such negligence was the proximate cause of the injury or not, then such negligence on the part of the plaintiff, however slight, must go in reduction of his damage in the proportion that such negligence bears to the negligence of the defendant.

(Declined.)

Which request was by the court refused and declined.

To which action of the court the defendant by counsel then and there excepted.

(*d*) For the error of the court in declining to charge as requested by the defendant as follows:

"I charge you that in this case you can only return a verdict for nominal damages, and by nominal damages, I mean five dollars, ten dollars, twenty dollars, or some such amount."

(Declined.)

Which request was by the court refused and declined.

To which action of the court the defendant then and there excepted.

IX.

For the error of the court in charging the jury as follows:

How are you to determine the amount of negligence of this deceased? You have heard all the evidence; you have heard the testimony of the fireman; you heard the testimony of the colored man, Sylvester Johnson, who was the flagman on the front end of that train, and these, so far as I now recall were the only eye witnesses to what occurred. You have seen the plat of the station; you have heard it explained by those who made it, and who understood the yards; you have heard stated the speed at which this train was moving in the yards; you have heard the rule pertaining to the movement of trains within the yards. Now, was this deceased at the time of this accident, moving his train in the yards at Gwin in accordance with these rules; was he moving cautiously; was he acting as a reasonably prudent man would have acted under like conditions and circumstances. If he was, then he would not be guilty of contributory negligence. If he was not, then he would be guilty of contributory negligence in some degree, but it is for you to
123 determine in what degree that might or might not have contributed to the accident. I express no view as to the weight of the evidence, or what it proves, but leave that to the jury to say.

X.

For the error of the court in charging the jury as follows:

"There is no rule by which you can take a pencil and paper and multiply or divide or add or by any other means of calculation arrive at that. In this case you will take into consideration the age of the deceased; his expectancy in life. The tables introduced here show that a man of his age, in good health, might reasonably expect to live 27½ years longer. You will take into consideration his health; his habits; whether or not he was an industrious man; his earning capacity; what he was capable of earning under this proof; the pain and suffering he endured at the time he was hurt, and then say what sum would reasonably compensate those entitled to recover, if they are entitled to recover for his death and suffering.

You can readily see that it would not be a proper manner to arrive at that result by taking the number of years that he might reasonably expect to live and multiply it by what he was earning, for the reason that he might die next week, or five years, or ten years from now, or, as he grows older, he might not be able to find employment at $150 per month by reason of his infirmity and age,

and other things that might arise that are in the range of probability. For that reason you couldn't well sit down and make up your verdict by multiplying $1800 by 27, but you take all those elements together and then say for yourself what sum would reasonably compensate the plaintiff. If you find that the deceased was guilty of contributory negligence, then you determine what proportion that bears to the negligence of the company, and reduce your verdict in the proportion that plaintiff's negligence bears to that of the defendant, as I have heretofore tried to state to you."

And in connection with this the following exception made by counsel for the railroad company:

"And also, your Honor, in summing up the facts which the jury should take into consideration in arriving at the amount of the verdict which they should render, if they should render any verdict, should also have stated to the jury that they would take into consideration Mr. Wright's employment, the fact that he was a railroad engineer, and that it was a hazardous occupation.

124 The COURT: Gentlemen of the Jury, I did not intend by any reference to any of the facts I stated, to exclude from you any fact that was testified to, and in determining the questions, or any questions in the case, all the evdence that is before you will be taken into consideration by you. The fact that this deceased was an experienced railroad man, and had been so for twelve years,—had been in the employ of the railroad companies for seventeen years, possibly, will be taken into consideration in determining whether or not he was guilty of negligence.

Mr. BIGGS: I mean this, your Honor, too. That the fact that he was in a hazardous occupation should be looked to by the jury in estimating his life expectancy, when they went to arriving at his damages.

The COURT: I decline that last proposition.

Mr. BIGGS: And then to the special requests which I have handed in to your Honor, I note an exception to each and every one of them.

XI.

And for the error of the court in charging the jury as follows, at the request of the plaintiff.

The COURT: "I charge you that there is a count in plaintiff's declaration charging that the other agents and servants of the defendant company were negligent in not warning plaintiff's intestate of the danger sooner, and it is contended by plaintiff that the fireman was negligent in assuring the deceased that all was all right and in afterwards failing to notify deceased of the danger in time to stop his engine. I charge you if you find that the fireman was negligent in this respect and his negligence was the proximate cause of the injury, then you must find for the plaintiff."

XII.

Because the verdict of the jury was excessive and the court should have granted a new trial, the remittitur required to be entered by

the court not being sufficient in view of the finding by the court that the deceased was himself guilty of contributory negligence which proximately contributed to his death.

Wherefore the defendant, The Yazoo & Mississippi Valley Railroad Company, assigns the following errors, and prays that the judgment of the District Court may be reversed.

FITZHUGH & BIGGS,
Attorneys for Defendant, the Yazoo & Mississippi Valley Railroad Company.

CHAS. N. BURCH,
Of Counsel.

125 United States of America, District Court of the United States, Western District of Tennessee, Western Division.

In the District Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its November Term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on to-wit: the 22nd day of March, A. D. 1912, in the following cause to-wit:

No. 4151.

Mrs. Ada R. Wright, Adm'x D. C. Wright, Deceased,
vs.
The Yazoo & Mississippi Valley Railroad Company.

Order Granting Writ of Error.

This day came the defendant by its counsel, Albert W. Biggs, and presented to the court its petition praying for the granting and allowance of a Writ of Error together with its assignment of errors in such behalf, intended to be urged by the said defendant before the United States Circuit Court of Appeals for this, the Sixth Circuit; Upon consideration whereof the prayer of said petitioner is granted and such Writ of Error awarded upon the said defendant filing herein a supersedeas bond conditioned according to law in the penal sum of Fifteen thousand dollars ($15,000.00).

And it is further ordered by the court upon application of said defendant that the clerk of this court forthwith prepare a full, true, and perfect copy of the record of proceedings had herein from which the said defendant and appellant is required to have the number of printed copies thereof for filing in said Appellate Court according to the act of Congress relative therto.

In the District Court of the United States in the Western District of Tennessee, Western Division.

No. 4151.

Mrs. Ada R. Wright, Adm'x D. C. Wright, Deceased,
vs.
Yazoo & Mississippi Valley Railroad Company.

Bond on Writ of Error.

Filed March 22nd, 1912. A. G. Mathews, Clerk.

Know All Men By These Presents, That we, the Yazoo and Mississippi Valley Railroad Company, as principal, and Thos. A. Evans as surety, are held and firmly bound unto the defendant in
126 error, Mrs. Ada R. Wright, Administratrix, in the full and just sum of five hundred dollars ($500.00), to be paid to the said defendant in error, Mrs. Ada R. Wright, Adm'x, her certain attorneys, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, and successors, jointly and severally by these presents.

Sealed with our seals, and dated this 22 day of March, in the year of our Lord, Nineteen Hundred and Twelve.

Whereas, lately at a District Court of the United States for the Western Division of the Western District of Tennessee, in a suit pending in said court between Mrs. Ada R. Wright, Adm'x of D. C. Wright, deceased, plaintiff, and The Yazoo and Mississippi Valley Railroad Company, defendant, having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Mrs. Ada R. Wright, Adm'x, citing and admonishing her to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit to be holden at the City of Cincinnati, State of Ohio, in said Circuit on the 20 day of April, next.

Now the condition of the above obligation is such that if the said The Yazoo & Mississippi Valley Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if it fails to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

THE YAZOO & MISSISSIPPI VALLEY
RAILROAD COMPANY,
By FITZHUGH AND BIGGS, *Attorneys.*
THOS. A. EVANS, *Surety.*

Approved by—

McCALL, *Judge.*

In the District Court of the United States in the Western District of Tennessee, Western Division.

No. 4151.

Mrs. Ada R. Wright, Adm'x D. C. Wright, Deceased,
vs.
The Yazoo & Mississippi Valley Railroad Company.

Supersedeas Bond.

Filed March 22nd, 1912. A. G. Mathews, Clerk.

127 Know All Men By These Presents, That we, the Yazoo and Mississippi Valley Railroad Company, as principal, and Illinois Central Railroad Company, Chas. N. Burch, and Albert W. Biggs, as sureties, are held and firmly bound unto the defendant in error, Mrs. Ada R. Wright, Adm'x of the estate of D. C. Wright, deceased, in the full and just sum of Fifteen Thousand Dollars ($15,000.00), to be paid to the said defendant in error, Mrs. Ada R. Wright, Adm'x, her executors, administrators, or assigns, and for which payment, well and truly to be made, we bind ourselves, our heirs, executors, successors and administrators, jointly and severally by these presents. Sealed with our seals and dated this, the 21st day of March, in the year of our Lord, 1912; and,

Whereas, lately at a District Court of the United States for the Western Division of the Western District of Tennessee, in a suit pending in said court between Mrs. Ada R. Wright, administratrix, as plaintiff, and the Yazoo and Mississippi Valley Railroad Company as defendant, a judgment was rendered against the Yazoo & Mississippi Valley Railroad Company for the sum of ten thousand dollars ($10,000.00), and the said The Yazoo and Mississippi Valley Railroad Company having obtained a Writ of Error and Supersedeas and filed a copy thereof in the Clerk's office in said court to reverse the judgment as aforesaid, and a citation directed to the said Mrs. Ada R. Wright, Adm'x, citing and admonishing her to be and appear at the next session of the United States Circuit Court of Appeals for the Sixth Circuit to be holden at the City of Cincinnati, in the State of Ohio, and within said circuit on the 20th day of April next.

Now the condition of the above obligation is such that if the said The Yazoo & Mississippi Valley Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if it fails to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.
By CHAS. N. BURCH,
Its Attorney.
ILLINOIS CENTRAL RAILROAD COMPANY,
By CHAS. N. BURCH,
Attorney-in-fact.
CHAS. N. BURCH.
ALBERT W. BIGGS.

Sealed and delivered in the presence of
——— ———.

Approved by
JNO. E. McCALL, *Judge.*

128 United States Circuit Court of Appeals for the Sixth Circuit.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Western District of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of the United States, before you or some of you between Ada R. Wright, Administratrix of D. C. Wright, deceased, as plaintiff and Yazoo & Mississippi Valley Railroad Co. as defendant, a manifest error hath happened to the great damage of the said Yazoo & Mississippi Valley Railroad Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if the judgment be therein given, that then under your seal, distinctly and openly you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, Ohio, in said Circuit on the 20th day of April, A. D. 1912 next, in said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals, may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States and the seal of said Circuit Court this the 22nd day of March, A. D. 1912, and of the Independence of the United States the 136th year.

A. G. MATHEWS,
Clerk of the District Court of the United States, Western District of Tennessee,
By E. J. HEIDEL, *Deputy.*

Allowed by
[SEAL.] JNO. E. McCALL,
U. S. District Judge.

I hereby, on this 30th day of March, A. D. 1912, accept due and legal service of the foregoing Writ of Error for and on behalf of the said Ada R. Wright, Administratrix of D. C. Wright, deceased, and to have this day received a copy thereof.

BARTON & BARTON,
Attorneys for Mrs. Ada R. Wright, Adm'r'x.

129 In the United States Circuit Court of Appeals for the Sixth Judicial Circuit.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To Ada R. Wright, administratrix of D. C. Wright, deceased, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in the State of Ohio, in said Circuit on the 20th day of April next, A. D. 1912, pursuant to Writ of Error filed in the Clerk's office of the Circuit Court of the United States for the Western Division of the Western District of Tennessee, wherein The Yazoo & Mississippi Valley Railroad Company is the plaintiff in error and you are the defendant in error, to show cause if any there be, why the judgment rendered against the said plaintiff in error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 22nd day of March in the year of our Lord One Thousand nine hundred and twelve and of the Independence of the United States the one hundred and thirty-sixth year.

[SEAL.]

JNO. E. McCALL,
United States District Judge.

I hereby, on this 30th day of March, A. D. 1912, accept due and legal service of the foregoing Citation for and on behalf of the said Ada R. Wright, Administratrix of D. C. Wright, deceased, and to have this day received a copy thereof.

BARTON & BARTON,
Attorneys for Mrs. Ada R. Wright, Adm'r'x.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit:

District Court of the United States, Western District of *D. C. Wright, Deceased.*

I, A. G. Mathews, Clerk of the District Court of the United States, for the Western District of Tennessee, do hereby certify that the papers hereto attached, are a full, true perfect and correct copies of the originals and of the entire record and proceedings in said Court, including the original Stipulation of Counsel, Citation and Writ of Error in said Court as the same now appears of rec-

130 ord and upon the files in my office, in the following cause, to-wit:

No. 4151, C. C.

Mrs. Ada R. Wright, Administratrix of D. C. Wright, Deceased,
vs.
Yazoo & Mississippi Valley Railroad Company.

In Testimony Whereof, I have hereunto written my name and affixed the Seal of said Court, at my office in the City of Memphis, Tennessee, this 6th day of April, A. D. 1912, and of the Independence of the United States the 136th year.

[SEAL.] A. G. MATHEWS, *Clerk.*

Authentication.

I, John E. McCall, a Judge of said Court, do hereby certify that A. G. Mathews, whose genuine signature appears to the foregoing certificate is, and was at the date of the same, Clerk of said Court and that his attestation is in due form.

JNO. E. McCALL,
Judge of the District Court of the United States for the District Aforesaid.

131 And afterwards to wit on April 15, 1912, præcipe for appearance of counsel was filed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2302.

Yazoo & Mississippi Valley Railroad Company
vs.
Mrs. Ada R. Wright, Administratrix of D. C. Wright, Deceased.

Præcipe.

Frank O. Loveland, Clerk of said Court:

Please enter *my* appearance as counsel for the plaintiff in Error.

ALBERT W. BIGGS,
CHARLES N. BURCH.

And afterwards to wit on March 5, 1912, an entry was made upon the Journal of said Court in said cause as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2302.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
vs.
ADA R. WRIGHT, Adm'x of D. C. Wright, Dec.

Before Warrington, Knappen & Denison, C. J.J.

Entry.

132 This cause is argued in part by Mr. Albert W. Biggs for the plaintiff in error and is continued until tomorrow for further argument.

And afterwards to wit on March 6, 1913, an entry was made in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2302.

YAZOO & MISSISSIPPI VALLEY RAILROAD CO.
vs.
ADA R. WRIGHT, Adm'x of D. C. Wright, Dec.

Entry.

This cause is further argued by Mr. McKinney Barton for the defendant in error and by Mr. H. D. Minor for the plaintiff in error and is submitted to the Court.

And Afterwards to wit, on May 6, 1913, a judgment was entered in said cause in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2302.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD CO.
vs.
Mrs. ADA R. WRIGHT, Administratrix of D. C. Wright, Dec.

Judgment.

133 Error to the District Court of the United States for the Western District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Tennessee, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause be and the same is hereby affirmed with costs.

And on the same day, to wit, May 6, 1913, an opinion was filed in said cause which reads and is as follows:

Opinion.

134 Filed May 6, 1913. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2302.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Plaintiff in Error,
vs.
ADA R. WRIGHT, Administratrix of D. C. Wright, Deceased, Defendant in Error.

Error to the District Court of the United States for the Western District of Tennessee.

Submitted March 6, 1913. Decided May 6, 1913.

Before Warrington, Knappen and Denison, Circuit Judges.

WARRINGTON, *Circuit Judge:*

This action was brought in the court below under the Employers' Liability Act of Congress. The plaintiff below is the widow and administratrix of D. C. Wright, who died on May 9, 1912, from injuries received while in the employ of the railroad company as an engineer and operating one of its interstate freight trains. The suit was brought for the benefit of the widow and three surviving children. The deceased received his injuries while entering the railroad yards at Gwin, Mississippi, when his engine collided with a coal car protruding so far over a side track on which it was standing as not to allow clearance for the engine then passing along a lead track. The declaration as amended contains eight counts charging negligence in various forms on the part of the railroad, its officers, agents and employes. The defenses set up were, in addition to the plea of not guilty, pleas of contributory negligence and assumption of risk. The verdict was for $19,000, which was reduced by the court to $10,000 and the company prosecutes error.

135 At the close of all the evidence the railroad moved for a directed verdict upon the ground, among others, that no negligence of the defendant had been shown. This motion was overruled, and, we think, rightly. One of the rules of the company provided that "Cars on side tracks, whether in yards or at stations, must

stand clear of all other tracks." One of the evident purposes of this rule was to prevent just such collisions as the one in question. The rule was admittedly violated, and, since this resulted in the death of plaintiff's decedent, the inference of defendant's negligence clearly required submission of the question to the jury; and the question was foreclosed by the verdict and the action of the court below in denying a new trial. The only other ground of the motion was that the deceased engineer assumed the risk of injury from the obstruction of the coal car. Defendant's counsel pressed this claim throughout the trial of the case; and it has been given paramount attention in this court, both upon brief and in oral argument. The learned trial judge held that assumption of risk was entirely abrogated as to persons operating under the Employers' Liability Act. The contention is, that this is so only as respects safety appliances, and that the protruding coal car was not a safety appliance. It is urged for the plaintiff that upon the evidence the question of assumed risk does not arise. If this is sound, it will not be necessary to pass upon any of the rulings of the trial court concerning the limitations placed upon the doctrine by the Employers' Liability Act; for in that event the rulings occasioned no prejudice.

It is important to inquire more closely into the conditions attending the accident. The train in question left the main track some 1,600 feet north of the point of collision and was moved southwardly along the main lead track of the yards until it reached a point something like 200 feet north of the coal car, when, it is claimed, the engineer had the coal car in full view and could determine whether his engine would or would not clear it. The evidence tends to show that the engineer had his train under control. Indeed, the steam was shut off and the train slowed up at or near the point last mentioned. The coal car was standing on the scale track which intersected the main lead track on its south side, that is, on the side opposite to that occupied by the engineer; the car lacked but little (the fireman testified four to ten inches) of clearing the space required for the engine to pass. As the engine approached the coal car it is reasonably plain from the evidence that the engineer's view of the car
136 gradually diminished until it was cut off by the engine, but that the fireman's view was not obstructed. It was one of the fireman's duties, under the rules, to "keep a careful watch upon the track and instantly warn the engineman of any obstructions," and the fireman here appears to have performed this duty to the best of his ability. He testified that the engineer asked him:

"How everything was around there, if it was in the clear, and I looked out to see if it was, and I said 'all right,' and he opened the engine up and went a short ways, and shut off again, and he asked me if some cars was clear over there * * * and I couldn't tell whether they were clear, or not, and we got right on them before I thought they wouldn't clear—lacked only four to eight or ten inches of clearing—"

The witness seeming to hesitate, the court directed him to proceed, when he said, evidently in answer to the second inquiry of the engineer—

"When he asked me if they would clear, I couldn't tell whether they would, or not. I thought all the time they would, and was still looking at them all the time. I hollered then that they wouldn't clear, and I said 'Get off,' and I jumped off of the engine, and the next I saw of him, he was caught between the tank and engine—and the cab. The corner of the car slashed the cab on my side, * * *."

The head brakeman testified that he was standing in the gangway of the engine, but the fireman testified that this brakeman was not on the engine at all. However, the brakeman stated that he told the engineer that "it didn't look like them cars was in the clear;" the engineer then

"asked the fireman was they clear, and the fireman was putting in the fire at the time, and when he got through, he looks ahead, and he told him they wouldn't clear, and he didn't understand the fireman and he asked me what he said, and I said he said they wouldn't clear, and the fireman had done jumped off, and he leaves his side to go to the fireman's side to see if they would clear, and I jumped off after he left his side."

Now, however this testimony may be viewed (and these were the only witnesses who appear to have seen the accident), one important feature of it stands out clearly. It is that the engineer and fireman were alert and that the clearance seemed to these experienced men sufficient (and this is not contradicted by the brakeman) until at or about the time the fireman jumped. Further, the brakeman claims to have jumped almost immediately after the
137 fireman, and no material lapse of time seems to have intervened between their leaving the engine and the engineer receiving his injuries; yet the fireman had previously told the engineer that the clearance was "all right." It is to be remembered, moreover, that the protrusion of the coal car into the space required for the passage of the engine was in a comparative sense not only slight in fact, but when the fireman was exercising and communicating to the engineer his judgment that the engine would clear, both presumably felt assured that the rule requiring cars on side tracks in the yards to "stand clear of all other tracks" had been complied with; for the requirement necessarily means that such cars shall "stand clear" with respect to the passage of engines and other cars along the adjacent track. It is strenuously urged, however, that this engineer saw the danger and assumed the risk of passing. As it seems to us, this overlooks the obvious force and effect of the evidence. The engineer seems to have been solicitous as to danger. He sought and employed the fireman, the company's designated agency, to assist him in ascertaining whether or not there was danger. He was assured that there was none until too late to avoid it.

We are convinced that there is no evidence really tending to show that the deceased assumed the risk of the danger that lurked in this protruding coal car. The essential quality of consent on his part is lacking. The vital question is whether he knew or was chargeable with knowledge of the danger and voluntarily exposed

himself to it. The fact that the means prescribed for finding out the danger were adopted and failed to reveal it in time to avoid it negatives the whole idea of conscious assumption; and this must not be confused with acts of negligence (1). Schlemmer v. Buffalo, Rochester, etc., Ry., 205 U. S. 1, 12; Smith v. Baker & Sons, App. Cas. (1891) 325, 336, 355; Narramore v. Cleveland C. C. & St. L. Ry. Co., 96 Fed. 298, 301 (C. C. A. 6th Cir.); Mundle v. Manufacturing Co., 86 Maine, 400, 405; Wagner v. Boston Elevated Railway, 188 Mass. 437, 441; Railway Co. v. Bancord, 66 Kan. 81, 90, 91; Chicago & E. R. Co. v. Ponn, 191 Fed. 688, 689 (C. C. A. 6th Cir.); Dorsey v. The Phillips & Colby Construction Company, 42 Wis. 583, 598, 599; National Steel Co. v. Hore, 155 Fed. 62, 65, 66 (C. C. A. 6th Cir.); Williams v. Bunker Hill & Sullivan Mining & C. Co., 200 Fed. 211, 216 (C. C. A. 9th Cir.). These decisions afford apt illustrations of the varying conditions under which the principle of assumption of risk is or is not
138 applicable. We do not mean to hold that where the pertinent evidence of a given case is conflicting as respects the employe's knowledge and appreciation of a danger and his consent to expose himself to it, the question can be determined as a matter of law as distinguished from its submission to the jury. What we hold is, that the evidence here is not conflicting touching the essential elements of assumption of risk, and, consequently, that it was not prejudicial error to refuse to submit the matter to the jury, no matter whether the obstruction in the instant case would under another state of facts be open or not to the defense of assumption of risk.

It is further insisted that the evidence in substance shows that the tracks in the railroad yards in question were generally and necessarily more or less filled with cars, and that this was a condition with which the deceased was familiar and was accompanied by danger which entered into the risks of his employment. This may well be conceded, but it does not affect the present case. The three coal cars in question, the foremost of which protruded as stated, were not on the main lead track along which the deceased was operating his engine and train. We have seen that one of the rules of the company forbade the placing of a car as this coal car was situated; and the evidence does not tend to show that the company was in the habit of violating this rule, much less that the deceased was bound to anticipate such violation. This rule entered into the contract of employment of the deceased, and even occasional disobedience of the rule would neither put the employe upon notice nor excuse the company. Cent. R. R. Co. of New Jersey v. Young, 200 Fed. 359, 367 (C. C. A. 3d Cir.), and cases cited.

The next contention is that the trial court erred in refusing to charge that the deceased was guilty of contributory negligence. The claim for the most part is that such negligence could operate only in mitigation of damages, not in bar of the action. The reason urged in support of the claim is that the engineer in the last mo-

(1.) This case is unlike Southern Ry. Co. v. Gadd, this day decided.

ments left his side of the engine to go to the opposite side where he met his injury. It will be remembered that he did this just after the fireman had left the engine and just as the brakeman claims that he left it. Whether the engineer went to the other side for the purpose of making an examination himself of the possibility of collision or from fear that the engine might, in case of collision, be turned over upon the side on which he regularly sat and so
139 injure him if he should jump on that side, is not clear. It is enough to say that the question of his contributory negligence was fully submitted to the jury under proper instructions. The natural inference would be that if the jury believed he did not exercise a reasonable degree of care, it reduced the damages accordingly. It is true that on the motion for a new trial, upon which the court was required to weigh the evidence (Big Brushy Coal & Coke Co. v. Williams, 176 Fed. 529, 532—C. C. A. 6th Cir.), it was found that the engineer was guilty of contributory negligence, and hence the verdict was reduced in the form of a remittitur, which was accepted, in the sum of $9,000, as before stated. It is to be observed further that after the close of the general charge, one of defendant's special requests was given, which was to the effect that if the intestate failed to exercise ordinary care and caution and so directly and proximately contributed to the injury, and that the defendant's negligence, if any, only remotely contributed thereto, then the verdict should be for the defendant. We see no error in any of these respects of which the railroad company can rightfully complain.

Objection is made to a special request asked and given for plaintiff after the close of the general charge which submitted the question, whether the fireman was negligent in first assuring the deceased that all was right and in afterwards failing to notify him of the danger in time to stop his engine, the court stating: "I charge you if you find that the fireman was negligent in this respect and his negligence was the proximate cause of the injury, then you must find for the plaintiff." It is urged that there was no allegation in the declaration and no evidence to warrant this charge, and, further, that the court failed to define "proximate cause." We think this falls fairly within the amended declaration; and while we are unable to see wherein the fireman failed in the discharge of his duty (unless possibly in delaying to reveal his doubts until too late), yet in the exception taken at the time not one of these objections was stated or called to the attention of the court. If it be admitted that there was error in any of the respects now claimed, it was slight (it was not even noticed in the motion for a new trial), and is not perceived to have affected the verdict. We are not disposed under the circumstances to disturb the judgment on any such ground. Central Union Depot & Ry. Co. v. Mansfield, 169 Fed. 614, 617 (C. C. A. 6th Cir.).

140 The only remaining assignment of error that need be noticed relates to a portion of the general charge which concerned the measure of damages. In summing up the elements that the jury might consider, the court included "the pain and suffering he (deceased) endured at the time he was hurt." It was error to

include such pain and suffering as part of the cause of action that accrued to the widow and children. Mich. Cent. R. R. v. Vreeland, 227 U. S. 59, 68; Garrett v. Louisville & N. R. Co., 197 Fed. 715, 720 (C. C. A. 6th Cir.). However, no exception was taken to this portion of the general charge at the time it was given. As Judge Severens said, in Coney Island Co v. Dennan, 149 Fed. 687, 692:

"Counsel were bound to present their point at the trial, so that the court might consider it, and can not, under a broad exception not aimed at it, upon subsequent search for error and finding it, bring it forward as a ground for reversing the judgment. It is a well-settled rule that an exception, in order to found a right to review, must be sufficiently distinct to direct the attention of the court to the particular error which is the subject of complaint."

See, also, Block v. Darling, 140 U. S. 234, 238; Pennsylvania Co. v. Whitney, 169 Fed. 572, 577 (C. C. A. 6th Cir.).

It is noticeable that the judgment below was for a gross sum and that no apportionment was made by the jury among the beneficiaries (Railway Co. v. McGinnis, Admx., decided by the Supreme Court April 7, 1913); but this apparently did not concern the defendant, for no allusion to it is to be found in the record.

The judgment below must be affirmed with costs.

141 And afterwards towit on June 5, 1913, a petition for writ of error was filed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2302.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

ADA R. WRIGHT, Administratrix of Estate of D. C. Wright, Deceased, Defendant in Error.

Petition for Writ of Error.

To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States:

Your petitioner, The Yazoo & Mississippi Valley Railroad Company, plaintiff in error in the above entitled cause, respectfully shows that the said cause is now pending in the United States Circuit Court of Appeals for the Sixth Circuit, and that a judgment has therein been rendered on the — day of May, 1913, affirming a judgment of the District Court of the United States for the Western District of Tennessee (Western Division), and that the matter in controversy in said suit exceeds $5,000.00, besides interest and costs, and

142 that the jurisdiction of none of the courts above mentioned is or was dependent in anywise upon the opposite parties to the suit or controversy being aliens and citizens of the United States

or citizens of different states, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error and therefore your petitioner would respectfully pray that a writ of error be allowed it in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the Sixth Circuit to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States and upon bond being executed as required by law that the same may operate as a supersedeas.

THE YAZOO & MISSISSIPPI VALLEY
RAILROAD COMPANY.
By CHAS. N. BURCH,
H. D. MINOR, AND
A. W. BIGGS,
Attorneys.

143 The foregoing petition is granted and writ of error allowed as prayed for upon plaintiff's giving bond according to law in the sum of $15,000.00 and upon bond being executed as required by law that the same may operate as a supersedeas.

J. W. WARRINGTON,
Circuit Judge, U. S. Sixth Circuit.

June 9, 1913.

We acknowledge service of the foregoing petition for writ of error and receipt of copy of said petition this June 3rd, A. D. 1913, at Memphis, Tenn.

BARTON & BARTON,
Attorneys for Ada R. Wright, Administratrix.

And on the same day, towit, June 5, 1913, an assignment of errors was filed which read- and *are* as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2302.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

ADA R. WRIGHT, Administratrix of Estate of D. C. Wright, Deceased, Defendant in Error.

Assignment of Errors on Writ of Error from Supreme Court of the United States to the Circuit Court of Appeals.

144 And now comes the plaintiff in error, The Yazoo & Mississippi Valley Railroad Company, by its attorneys, and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Sixth Judicial Circuit, in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of the said plaintiff in error in this, towit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Western District of Tennessee (Western Division) for $10,000.00 and costs of the suit, entered on May —, 1913, (rendered by District Court March 4, 1912) in favor of said defendant in error and against the said plaintiff in error.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court aforesaid and in not remanding said cause to said District Court for a new trial.

145 Third. Said Circuit Court of Appeals erred in rendering judgment against plaintiff in error and in favor of said defendant in error for costs of suit in said Circuit Court of Appeals.

Fourth. Said Circuit Court of Appeals erred in not sustaining the first assignment of error upon the record in this cause, same being based on the refusal of the District Court to give a peremptory instruction in favor of the defendant below at the close of all the proof as requested by said defendant below at the time.

Fifth. Said Circuit Court of Appeals erred in not sustaining the second assignment of error upon the record in said cause which assigned error on the part of the District Court in holding that the Federal Employers' Liability Act abrogated the defense of assumption of risk.

Sixth. Said Circuit Court of Appeals erred in not sustaining the third assignment of error upon the record in this cause which charged error on the part of the District Court in refusing to grant the motion of the defendant below, made at the proper time—at the conclusion of all the evidence—for a peremptory instruction to the jury to find for the defendant below, said motion for a per-

emptory instruction being based upon the grounds (1) that
146 of negligence on the part of the defendant below had been shown; (2) that the obstruction of the car in question was not a defect within the meaning of the Employers' Liability Act; (3) that under the proof the plaintiff's intestate had assumed the risk of injury by reason of the obstruction or occupation in whole or in part of the tracks, switches or sidings while in the yards; and (4) that plaintiff's intestate was sure to have known the proximity of the car to the track and assumed the risk in attempting to go by it.

The said third assignment of error is set forth in detail in the printed record in the said Circuit Court of Appeals at pages 114-119, to which reference is now here made for a more detailed statement.

Seventh. Said Circuit Court of Appeals erred in not sustaining the said third assignment of error upon the record in this cause in denying the defendant the defense of assumption of risks as follows:

"The plaintiff's intestate was an experienced railroad man who had been running a train two or three times a week into the company's yards at Gwin, Mississippi, and this suit is founded upon the alleged negligence of the railroad company in permitting
147 a car standing upon the scale track in the company's yard at Gwin, Mississippi, to protrude over so as to obstruct the lead track on which the train (of which the deceased was an engineer) was moving, and that the deceased met his death as a result of the collision between the protruding car and the engine of his train.

The proof shows that the leaving of cars in this manner was frequent and unavoidable in the operation of railroad yards, especially the yards at Gwin, with which the deceased was acquainted, and in the instant case the fact that the car was protruding over and obstructing the track along which his train was moving was known to the deceased who, instead of stopping the train, undertook to run by the obstruction, thereby causing a collision between his engine and the car resulting in his death. He therefore assumed this risk and the plaintiff is not entitled to recover."

Under the foregoing state of facts the District Court erred—and the said Circuit Court of Appeals erred in refusing to sustain the assignment of error thereupon—in the following respects:

(*a*) In overruling the motion of plaintiff in error (defendant below) for a peremptory instruction made on behalf of said defendant below at the close of the proof of the plaintiff below.

(*b*) In declining to give the motion for a peremptory instruction made by the defendant below at the close of all the proof on the four grounds mentioned in the last preceding assignment of error.

148 (*c*) In charging the jury at the trial in the District Court as follows:

"In the view that I have taken of the law as to the third plea, I do not think it proper to charge the jury upon the question raised, that is, the assumption of risk. But I submit this case to you upon the negligence of the defendant company, in the first place, if any

has been shown by the proof, and in the second place, the negligence of the deceased, if any has been shown."

(*d*) In declining the charge to the jury as requested by the defendant below as follows:

"I charge you that the plaintiff's intestate, D. C. Wright, was injured by reason of a collision between his train drawn by engine No. 495, striking certain cars in the yards at Gwin, Mississippi, which resulted in the death of the said D. C. Wright under the following circumstances:

The train of which Wright was the engineer had pulled into Gwin, Mississippi, and has left the main track of the railroad company, and had entered upon a lead or switch track; that in order to do this, it was necessary for the crew of the train of which Wright was an engineer, to throw a switch in order for a certain train to go in upon said siding; that after said switch has been thrown, the train had passed in upon said siding and the switch was then closed behind this train and proceeding along the said siding, the accident happened by the collision if the engine No. 495, operated at the time by the plaintiff's intestate, D. C. Wright, striking against cars standing upon a switch track, and so close to, or projecting on the track upon which Wright's train was moving as that Wright's engine struck the said cars, causing a collision which resulted in his injuries and death.

149 I further charge you that by virtue of his employment, this accident was one of the ordinary risks of the service, that is to say, under the rules of the company, enginemen and trainmen were notified that when entering or moving through sidings or yard tracks, they must expect to find them occupied and as this accident resulted from the occupancy of yard tracks by cars, it was one of the assumed risks incident to the employment of Wright, and, therefore, the plaintiff's intestate is not entitled to recover in this cause, and your verdict should be for the defendant, the Yazoo & Mississippi Valley Railroad Company."

Eighth. Said Circuit Court of Appeals erred in not sustaining the fifth assignment of error upon the record in this cause which charged error on the part of the District Court in declining to charge the jury as requested by the defendant below as follows:

"If you find from the proof that the plaintiff's intestate, D. C. Wright, for whose death this suit is brought, was an experienced railroad man, and that by virtue of his employment as such he was acquainted with the manner and method in which trains moved in the yards of the company at Gwin, Mississippi, and you further find from the facts that under the rules of the company and the method of transacting its business, that trains moving on sidings or in the yards of the company, did so expecting to find the sidings or yard switches occupied or obstructed, and you further find that the injury and death of the said D. C. Wright was brought about by the collision of the engine of Wright's train with other cars, wholly or partially occupying or obstructing the track along which Wright's engine was passing, then I charge you that there can be

no recovery in this case, because the said D. C. Wright, by
150 virtue of his employment, assumed the risk incident to a collision of his train with cares upon or occupying or obstructing the tracks in the yards of the company. And your verdict, if you find the facts as I have stated them, should be for the defendant, the Yazoo & Mississippi Valley Railroad Company."

Ninth. Said Circuit Court of Appeals erred in not sustaining the said fifth assignment of error upon the record in this cause which charged error also on the part of the District Court in refusing to charge the jury as requested by the defendant below as follows:

"If you find from the proof that the plaintiff's intestate was an experienced railroad man, that he was furnished with a book of rules of the company, that among such rules was rule No. 523, towit: 'Trains and engines must run with caution when entering or moving through sidings or yard tracks, expecting to find them occupied.' And you further find that, after entering the yards and passing upon a siding or lead track, his engine in passing another track known as the scale track, struck cars standing on said scale track, and which were so close to the track upon which his engine was moving as that the engine could not pass said cars without striking *it*, and you further find that the deceased, D. C. Wright, was acquainted with the danger incident to passing cars in the condition that these cars were in: that he knew their situation and his attention had been directed to them, and that his death resulted from his engine being struck by the said cars, then I charge you that there can be no recovery in this case, because the said D. C. Wright assumed the risk incident to the same, and your verdict, if you
151 find as I have stated, should be for the defendant, the Yazoo & Mississippi Valley Railroad Company."

Tenth. Said Circuit Court of Appeals erred in not sustaining the fifth assignment of error upon the record in this case which charge error on the part of the District Court further in refusing to charge the jury as requested by the defendant below as follows:

"Recovery in this case is sought under the provisions of what is known as 'The Employer's Liability Act,' enacted by the Congress of the United States, and approved April 22, 1898 (1908).

I charge you that the effect of the said act is not to interfere with the rule existing at common law upon the question of assumption of risk as that doctrine applies in this case. In other words, the only effect — that statute was to abolish the assumption of risks of employment in any case where violation by such common carrier of a statute enacted for the safety of employes contributed to the injury or death of such employe. Therefore, I charge you that the said act does not affect the doctrine of assumption of risk as it applies in this case growing out of the movement of cars or trains in the company's yards, the occupying blocking or obstructing sidings, switches or other tracks than the main line tracks in the yards of the company, and that if the plaintiff was injured by projecting, and he was *no* injured, and he saw them, or his attention was called to them, that your verdict must be for the defendant."

Eleventh. Said Circuit Court of Appeals erred in not sustaining

the said fifth assignment of error upon the record in this
152 cause which charged further error on the part of the District Court in refusing to charge the jury as requested by the defendant below as follows:

"If you find from the proof that D. C. Wright was the engineer in charge of an extra freight train, and that said train entered the yards of the company at Gwin, and if the said Wright, attempting to pass cars upon a side track, or scale track, the collision occurred which resulted in his injury and death, and you further find that said Wright knew, or by the exercise of ordinary care could have discovered, that the said cars on the side or scale track were within striking distance of the engine, or if he was warned or advised that his engine could not pass said cars without striking them, and you further find that he undertook to pass said cars, then I charge you that he assumed the risk of safely passing the said cars and if he was injured as a result thereof there can be no recovery by the plaintiff in this case, and your verdict should be for the defendant."

Twelfth. Said Circuit Court of Appeals erred in not sustaining the eleventh assignment of error (p. 124 of the printed record), which was based upon the error of the District Court in charging the jury at the request of the plaintiff as follows:

"I charge you that there is a count in plaintiff's declaration charging that the other agents and servants of the defendant company were negligent in not warning plaintiff's intestate of the danger sooner, and it is contended by plaintiff that the fireman was negligent in assuring the deceased that all was all right and in afterwards failing to notify deceased of the danger in time to stop his engine. I charge you if you find that the fireman was
153 negligent in this respect and his negligence was the proximate cause of the injury then you must find for the plaintiff."

Thirteenth. The said Circuit Court of Appeals erred in holding that without regard to whether the Employer's Liability Act abolished the defense of assumption of risk the facts in the case were not sufficient to sustain that defense.

Fourteenth. The said Circuit Court of Appeals erred in refusing to hold that the master, the defendant below, fully discharged its duty to the plaintiff's intestate when it promulgated and put into effect the rule shown on page 65 of the record, same being rule 523 and reading:

"Trains and engines must be run with caution when entering or moving through sidings or yard tracks, expecting to find them occupied."

Fifteenth. Said Circuit Court of Appeals erred in holding that the record in this cause justified or warranted a verdict and judgment in favor of the plaintiff below, for that the facts proven at the trial and shown in the record clearly indicate that the situation which caused the death of the plaintiff's intestate was a situation which was apparent to him on entering the yards, and that
154 failing to exercise any care to protect himself he was the author of his own injury.

Sixteenth. Said Circuit Court of Appeals erred in holding that

the record in this cause justified or warranted a verdict and judgment in favor of the plaintiff below for that the facts proven at the trial and shown in the record clearly indicate that the plaintiff's intestate was fully aware that there was a risk or danger of his engine striking the car on the track ahead of him, and that without determining whether he could safely pass said car or not and with full knowledge or means of knowledge that he might not be able to pass with safety took the chance and, therefore, voluntarily assumed the risk which it was wholly unnecessary for him to have assumed.

Wherefore, the said Yazoo & Mississippi Valley Railroad Company, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiff in error the said judgment of the said United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and that said cause be remanded to the United States District Court for the Western District of Tennessee with instructions to grant a new trial in said cause or for such further proceedings in said cause as may be determined upon by this honorable court, to the end that justice may be done in the premises.

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CHAS. N. BURCH,
H. D. MINOR,
A. W. BIGGS,
Attorneys for Plaintiff in Error.

And afterwards towit on June 13, 1913, a bond on writ of error was filed which reads and is as follows:

Know all men by these presents, That we, The Yazoo & Mississippi Valley Railroad Company, as principal, and United States Fidelity and Guaranty Company, as sureties, are held and firmly bound unto Ada R. Wright, Administratrix of the Estate of D. C. Wright, Deceased, in the full and just sum of Fifteen Thousand Dollars, to be paid to the said Ada R. Wright, Administratrix of the Estate of D. C. Wright, Deceased, her certain attorney, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 11th day of June, in the year of our Lord one thousand nine hundred and thirteen.

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Whereas, lately at a session of the United States Circuit Court of Appeals for the Sixth Circuit in a suit depending in said Court, between The Yazoo & Mississippi Valley Railroad Company, Plaintiff in Error and Ada R. Wright, Administratrix of the Estate of D. C. Wright, Deceased, Defendant in Error, a judgment was rendered against the said The Yazoo & Mississippi Valley Railroad Company, and the said The Yazoo & Mississippi Valley Railroad Company, having obtained an allowance of writ of error from the Supreme Court of the United States to the United States Circuit Court of Appeals for the Sixth Circuit to reverse the judgment in the aforesaid suit:

Now, The Condition of the Above Obligation Is Such, That if the said The Yazoo & Mississippi Valley Railroad Company shall

prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
By H. D. MINOR, *Atty.* [SEAL.]

157 UNITED STATES FIDELITY AND GUARANTY COMPANY,
By EDWARD E. SHIPLEY, [SEAL.]
Attorney in Fact.

Sealed and delivered in the presence of:

——— ———.

Approved by:
J. W. WARRINGTON,
United States Circuit Judge.

And on the same day towit, June 13, 1913, a citation was issued in said cause which reads and is as follows:

158 UNITED STATES OF AMERICA, *ss:*

To Ada R. Wright, Administratrix of D. C. Wright, Deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Sixth Circuit wherein The Yazoo & Mississippi Valley Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John W. Warrington, Circuit Judge for the Sixth Circuit, this 13th day of June, in the year of our Lord one thousand nine hundred and thirteen.

J. W. WARRINGTON,
U. S. Circuit Judge for the Sixth Circuit.

We acknowledge service of the foregoing citation and receipt of copy thereof this June 16, A. D. 1913.

BARTON & BARTON,
Attorneys of Record for Ada R. Wright, Adm'x of Estate of D. C. Wright, Deceased.

159 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit

Court of Appeals for the Sixth Circuit, before you, or some of you, between Ada R. Wright, Administratrix of D. C. Wright, deceased, and the Yazoo & Mississippi Valley Railroad Company, a manifest error hath happened, to the great damage of the said Yazoo & Mississippi — Railroad Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 13th day of June, in the year of our Lord one thousand nine hundred and thirteen.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk U. S. Circuit Court of Appeals for the Sixth Circuit.

Allowed by:

J. W. WARRINGTON,
United States Circuit Judge, Sixth Circuit.

160 United States Circuit Court of Appeals for the Sixth Circuit, *ss:*

In pursuance of the command of the within writ of error, I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby transmit under the seal of said Court, a true, full and complete copy of the record and proceedings in said Court in said cause and matter in said writ of error stated: together with all things concerning the same, to the Supreme Court of the United States, together with said writ of error and the citation to said defendant in error.

Witness my official signature and the seal of said Court at Cincinnati, Ohio, in said Circuit, this 18th day of June, 1913.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

[Endorsed:] Filed Jun- 13, 1913. Frank O. Loveland, Clerk.

161 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings together with the original writ of error and citation in the case of The Zazoo & Mississippi Valley R. Co. vs. Ada R. Wright, Administratrix, etc., No. 2302, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 18th day of June A. D. 1913.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 23,797. U. S. Circuit Court Appeals, 6th Circuit. Term No. 218. The Yazoo & Mississippi Valley Railroad Company, plaintiff in error, vs. Ada R. Wright, administratrix of D. C. Wright, deceased. Filed July 17th, 1913. File No. 23,797.

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No. 218

IN THE

SUPREME COURT OF THE UNITED STATES

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

ADA R. WRIGHT, ADMINISTRATRIX, Defendant in Error.

ON WRIT OF ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

STATEMENT OF THE CASE, ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

H. D. MINOR,
CHARLES N. BURCH,
For Plaintiff in Error.

S. C. TOOF & CO., PRINTERS, MEMPHIS

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IN THE

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vs.

ADA R. WRIGHT, ADMINISTRATRIX, *Defendant in Error.*

ON WRIT OF ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

STATEMENT OF THE CASE, ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

(*For convenience parties are referred to as plaintiff and defendant. All italics are ours. References to record are to top paging, unless otherwise indicated.*)

THE POINT IN THE CASE.

The principal reliance of the defendant (plaintiff in error) was that the deceased engineer had assumed the risk. There was testimony which, at

the least, required the submission to the jury of this question. The trial court emphatically instructed the jury that the defense of assumption of risk was abolished by the Federal Employer's Liability Act and declined, therefore, to submit that issue of fact to them or to decide it himself (*infra*, pp. 60-63). The Circuit Court of Appeals passed by the question of law, holding that the risk was not assumed.

It is our contention that under the facts even as they are stated by both the lower court and the Court of Appeals, the risk was obvious and assumed.

THE CASE STATED.

On May 9, 1911, the plaintiff's intestate, D. C. Wright, was an engineer in the employ of the Yazoo & Mississippi Valley Railroad Company, the plaintiff in error, and was operating a freight train. He had theretofore been a yard engineer for the Illinois Central Railroad Company (p. 27), and had been in the employ of the plaintiff in error for seven years, during which time he had "very frequently" (p. 27) gone to Gwin, Miss., where the company maintained the yards in which the accident occurred. About three o'clock in the afternoon with a southbound freight train of about 20 cars *properly equipped* (p. 77), he left the main line at Gwin and started south to the yards on what is known as the "lead track,"

from which, further south, a number of side tracks diverged. The sixth of these diverging tracks, south from the point where the lead track left the main line—about 1,600 feet from said point—was known as the scale track and on this scale track were several coal cars, the northermost of which protruded from four to ten inches over the lead track.

The engineer's death resulted in this way: His engine struck the protruding corner of the coal car, but was not derailed. It continued to move forward and the engineer, having gone from his own side to the fireman's side the moment after the collision, was caught between the offending car and the cab of his engine.

This lead track was practically straight from the point where it left the main line south to the point of collision—a distance of about 1,600 feet.

After going upon the lead track and at a point "something like 200 feet north of the coal car" (p. 122), the engineer inquired of the fireman, C. W. Johnson, whether the track was clear, to which the fireman replied he thought it was. A little later, when the engine was about two car lengths from the coal car, the engineer was informed by the brakeman, who was on the engine with him *and on the same side of the engine*, that "it didn't look like them cars was in the clear" (p. 74). Thereupon—and at this time the engine was about 1½ or 2 car

lengths from the coal car—the engineer again asked the fireman whether those cars were in the clear (p. 74). The fireman did not respond immediately as he was replenishing his fire and then, to use his language, "I hollowed then that they wouldn't clear and I said get off" (p. 30).

The colored brakeman, Silvester Johnson, testified that he threw the switch to let the engine onto the lead track and then mounted the engine and rode with it to the point of collision; that he was on the right-hand side of the engine—the engineer's side—and saw the cars near the track ahead. He spoke to the engineer and told him "it didn't look like them cars was in the clear" (p. 74), whereupon the engineer asked the fireman. The latter was replenishing his fire, but, a moment later, looked out and told the engineer they wouldn't clear. Thereupon the brakeman jumped off. The engineer went over to the fireman's side, where he received his injury.

The fireman testified (and this is the only conflict in the evidence) that the colored brakeman was not on the engine, though he admitted that that was his proper place. We are entitled, however, in this state of the case, to take the testimony of the brakeman as true.

The two witnesses mentioned, C. W. Johnson, the fireman, and Silvester Johnson, the colored brake-

man, were the only witnesses who were present at the time of the accident or who were eye witnesses.

The rate of speed at which the train was moving when the engineer made his first inquiry of the fireman was stated by the fireman, a witness for the plaintiff, thus (p. 50):

> "Well, we were going at the rate of between three and four miles an hour, I will say, or perhaps three miles an hour."

The Court of Appeals in this connection found (p. 122):

> "The evidence tends to show that the engineer had his train under control. Indeed, the steam was shut off and the train slowed up at or near the point last mentioned" (i. e., 200 feet north of the coal car).
>
> Record, p. 122 (135).

The statement of the fireman, the only witness testifying on the subject, was this (p. 39):

> "Q. I want to ask you this. After you entered that switch (the lead track), state whether or not the engineer shut off the steam, and rolled along?
>
> Objection.
>
> The Court: Ask him what he did.
>
> Q. What did he do after shutting off the steam?
>
> A. He shut off the engine and rolled in, and came very near to a stop—to a stop for the flagman to get off and close the switch and catch the caboose again.

Q. What did he do then?

A. He opened the throttle and worked steam a little ways and then shut off again while I was putting in the fire."

Record, p. 39 (41).

At the time of the engineer's second inquiry of the fireman, induced by the warning of the colored brakeman a moment before that the cars were not in the clear, the engine was 1 1-2 or 2 car lengths from the protruding coal car (p. 37). A car length averages "about 34 or 40 feet" (p. 40). Average these figures, the engine was practically 60 feet from the coal car when the engineer made his last inquiry as to whether he could pass.

As soon as the fireman saw that the cars would not pass, he jumped off on his own side and the colored brakeman got off on the other side about the same time or earlier. The engineer "leaves his side to go to the fireman's side to see if they would clear" (p. 74) and while there received his fatal injuries.

RULES AND CONDITIONS IN YARD.

It was conceded that the deceased engineer had a book of rules promulgated by the Railroad Company for the government of the engineers and therefrom were read in evidence the following:

"523. Trains and engines must be run with caution when entering or moving through sid-

ings or yard tracks, expecting to find them occupied" (p. 61).

"833. They (enginemen) must keep a constant and vigilant lookout for signals and the position of switches while running, also for obstructions and defects of tracks, and must frequently look back, especially while rounding curves, to see whether they have the whole train and it is all right" (pp. 61-62).

"106. In all cases of doubt or uncertainty, the safe course must be taken and no risks run" (p. 62).

"525. Cars on side tracks, whether in yards, or at stations, must stand clear of all other track" (p. 65).

Other rules are shown at page 78 of the record but those just quoted are the only ones now material.

The reason and purpose of these rules are set forth by witness Dubbs, one of the superintendents of the defendant company, at pp. 60-66. He points out that it often happens that tracks in yards are obstructed for various reasons and that conditions arise from time to time which make it impossible to keep all the tracks clear of cars; that cars will be standing on any track in the yards and are liable to be found there at any time. Such a condition prevails generally in railroad yards. See p. 62 (66).

Mr. J. M. Walsh, Superintendent of Terminals for the Frisco at Memphis, in testifying about how cars are handled in terminals, said (p. 67):

"Certain limits are defined as yard limits, in which switching crews work on the various

tracks, proceeding with such speed as will prevent them from running into other cars left on other tracks by other engines. A great many engines work within yard limits irrespective of the other one's movements, and each must look out for their own protection, not damaging cars by striking them, not running into any other cars, because every other engine in the yard working in yard limits have a right to work in that territory in the absence of another engine. Road trains coming into that territory must move with such speed as will permit them to stop in case any track they may want to use is occupied or partly occupied."

Mr. Walsh was then asked this question (p. 67):

"State whether or not tracks are frequently occupied and partially occupied, or whether that is a seldom occurrence."

Objection was made by counsel for plaintiff, and the Court held the question immaterial, saying (p. 67):

"The Court: I have stated that my ruling on the law is that the doctrine of assumption of risk has been abolished by the act of Congress, except where the carrier or employer is not guilty of negligence."

Objection was then withdrawn by counsel for plaintiff below and Mr. Walsh proceeded to answer as follows (p. 68):

"The tracks are occupied wholly and partially by a large number of crews in yards at

different places. Cars are left indiscriminately in yard limits, and no one has a right to run into them."

When Mr. Pelter, Superintendent at Memphis for the Southern Railway Company, was offered as a witness for the defendant, it was agreed that his testimony would be the same as that of Mr. Walsh.

Record, p. 76 (82).

In addition to the foregoing the situation is thus described by plaintiff's witness, the fireman:

"Q. Were there generally cars on that track?

A. Well, cars around through the yards all the time. A man won't take any special notice of cars standing around on the tracks not concerning him.

Q. The yards at Gwin was the place where the trains are broken up from Memphis division, and what is known as the Louisiana Division, isn't it?

A. Yes, sir.

Q. And all freight trains moving by what is known as the Valley route to New Orleans, passed through the Gwin yards; that is, a great many trains go that way?

A Yes, sir.

Q. And these Gwin yards themselves are very busy yards—great many trains in and out of them—freight trains?

A. Well, at times there was, yes, sir.

Q. How, how was it in May; good many trains at that time moving?

A. Well, yes, sir.

Q Good many trains moving?

A. Business was fairly good at that time.

Q. So, as a matter of fact, nearly every freight track there was occupied with cars; it was no common thing to see all the tracks occupied?

A. No, sir.

Record, p. 46 (48).

TRAIN EQUIPMENT.

In the course of the trial the following occurred with respect to the equipment of trains:

"Judge Barton (plaintiff's attorney): One count here in the declaration is that it was not properly equipped with safety appliances. We abandon that."

Record, p. 77 (83).

TRIAL AND SUBSEQUENT PROCEEDINGS.

At the conclusion of the plaintiff's testimony, defendant asked for a peremptory instruction (p. 55). This was denied, the Court saying (p. 56):

"I think this act passed by Congress abolishes the defense of assumption of risk in cases where accident is caused by or proximately contributed to by the negligence of the carrier."

At the conclusion of all of the evidence, defendant again asked for a peremptory instruction (p. 79), which was denied and thereupon the case was submitted to the jury upon the evidence and the charge of the Court (pp. 80-85). Numerous special

charges asked for by the defendant, most of which were based upon the doctrine of assumption of risk (pp. 86-92), were refused.

The jury returned a verdict in favor of the plaintiff for $19,000. On defendant's motion for a new trial (pp. 92-100), the Court required a remititur of $9,000 and on that being accepted overruled the motion, whereupon the writ of error from the Circuit Court of Appeals was sued out.

In the Circuit Court of Appeals, the judgment of the trial court was affirmed and the present writ of error was then secured.

The facts, as they appeared to the Court of Appeals, are set forth in the opinion of that Court (pp. 122-123). They are in accord with the statement above set out.

ASSIGNMENT OF ERRORS.

The learned Circuit Court of Appeals erred:

1. In entering judgment affirming the judgment of the District Court for $10,000.00 in favor of said defendant in error and against the said plaintiff in error.

2. In not reversing the judgment of the District Court aforesaid and in not remanding said cause for a new trial.

3. In rendering judgment against plaintiff in error and in favor of said defendant in error for costs of suit in said Circuit Court of Appeals.

4. In not sustaining the first assignment of error upon the record in this cause, same being based on the refusal of the District Court to give a peremptory instruction in favor of the defendant below at the close of all the proof as requested by said defendant below at the time.

5. In not sustaining the second assignment of error upon the record in said cause which assigned error on the part of the District Court in holding that the Federal Employers' Liability Act abrogated the defense of assumption of risk.

6. In not sustaining the third assignment of error upon the record in this cause which charged error

on the part of the District Court in refusing to grant the motion of the defendant below, made at the proper time—at the conclusion of all the evidence—for a peremptory instruction to the jury to find for the defendant below, said motion for a peremptory instruction being based upon the grounds (1) that no negligence on the part of the defendant below had been shown; (2) that the obstruction of the car in question was not a defect within the meaning of the Employers' Liability Act; (3) that under the proof the plaintiff's intestate had assumed the risk of injury by reason of the obstruction or occupation in whole or in part of the tracks, switches or sidings while in the yards; and (4) that plaintiff's intestate knew of the proximity of the car to the track and assumed the risk in attempting to go by it. Said third assignment of error is set forth in detail in the printed record at pages 105-109 (114-119), to which reference is now made for a more detailed statement.

7. In not sustaining the said third assignment of error and in denying the defendant the defense of assumption of risks as follows:

> "The plaintiff's intestate was an experienced railroad man who had been running a train two or three times a week into the company's yards at Gwin, Miss., and this suit is founded upon the alleged negligence of the railroad company in permitting a car standing upon the scale track in the company's yards at Gwin, Miss., to

protrude over so as to obstruct the lead track on which the train (of which deceased was engineer) was moving, and that the deceased met his death as a result of the collision between the protruding car and the engine of his train.

"The proof shows that the leaving of cars in this manner was frequent and unavoidable in the operation of railroad yards, especially the yards at Gwin, with which the deceased was acquainted, and in the instant case the fact that the car was protruding over and obstructing the track along which his train was moving was known to the deceased who, instead of stopping the train, undertook to run by the obstruction, thereby causing a collision between his engine and the car, resulting in his death. He therefore assumed this risk and the plaintiff is not entitled to recover."

Under the foregoing state of facts the District Court erred—and the Circuit Court of Appeals erred in refusing to sustain the assignment of error thereupon—in the following respects:

(a) In overruling the motion of plaintiff in error (defendant below) for a peremptory instruction made on behalf of said defendant below at the close of the proof of the plaintiff below.

(b) In declining to give the motion for a peremptory instruction made by the defendant below at the close of all the proof on the four grounds mentioned in the last preceding assignment of error.

(c) In charging the jury at the trial in the District Court as follows:

> "In the view that I have taken of the law as to the third plea, I do not think it proper to charge the jury upon the question raised, that is, the assumption of risk. But I submit this case to you, upon the negligence of the defendant company, in the first place, if any has been shown by the proof, and in the second place, the negligence of the deceased, if any has been shown."

(d) In declining the charge to the jury as requested by the defendant below as follows:

> "I charge you that the plaintiff's intestate, D. C. Wright, was injured by reason of a collision between his train drawn by engine No. 495, striking certain cars in the yards at Gwin, Miss., which resulted in the death of the said Wright under the following circumstances:
>
> The train of which Wright was the engineer had pulled into Gwin, Miss., and had left the main track of the railroad company, and had entered upon a lead or switch track; that in order to do this, it was necessary for the crew of the train of which Wright was an engineer, to throw a switch in order for a certain train to go in upon said siding; that after said switch has been thrown, the train had passed in upon said siding and the switch was then closed behind this train and proceeding along the said siding, the accident happened by the collision if the engine No. 495, operated at the time by the plaintiff's intestate, D. C. Wright, striking against cars standing upon a switch track, and so close to, or projecting on the track upon which Wright's

train was moving as that Wright's engine struck the said cars, causing a collision which resulted in his injuries and death.

I further charge you that by virtue of his employment, that is to say, under the rules of the company, enginemen and trainmen were notified that when entering or moving through sidings or yard tracks, they must expect to find them occupied and as this accident resulted from the occupancy of yard tracks by cars, it was one of the assumed risks incident to the employment of Wright, and, therefore, the plaintiff's intestate is not entitled to recover in this cause, and your verdict should be for the defendant, the Y. & M. V. R. R. Co."

8. In not sustaining the fifth assignment of error upon the record in this cause which charged error on the part of the District Court in declining to charge the jury as requested by the defendant below as follows:

"If you find from the proof that the plaintiff's intestate, D. C. Wright, for whose death this suit is brought, was an experienced railroad man, and that by virtue of his employment as such he was acquainted with the manner and method in which trains moved in the yards of the company at Gwin, Miss., and you further find from the facts that under the rules of the company and the method of transacting its business, that trains moving on sidings or in the yards of the company, did so expecting to find the sidings or yard switches occupied or obstructed, and you further find that the injury and death of the said Wright was brought about by the collision of the engine of Wright's train with

other cars, wholly or partially occupying or obstructing the track along which Wright's engine was passing, then I charge you that there can be no recovery in this case, because the said Wright, by virtue of his employment, assumed the risk incident to a collision of his train with cares upon or occupying or obstructing the tracks in the yards of the company. And your verdict, if you find the facts as I have stated them, should be for the defendant, the Y. & M. V. R. R. Co."

9. In not sustaining the said fifth assignment of error upon the record in this cause which charged error also on the part of the District Court in refusing to charge the jury as requested by the defendant below as follows:

"If you find from the proof that the plaintiff's intestate was an experienced railroad man, that he was furnished with a book of rules of the company, that among such rules was rule No. 523, to-wit: 'Trains and engines must run with caution when entering or moving through sidings or yard tracks, expecting to find them occupied.' And you further find that, after entering the yards and passing upon a siding or lead track, his engine in passing another track known as the scale track, struck cars standing on said scale track, and which were so close to the track upon which his engine was moving as that the engine could not pass said cars without striking it, and you further find that the deceased, D. C. Wright, was acquainted with the danger incident to passing cars in the condition that these cars were in; that he knew their situation and his attention had been directed to them,

and that his death resulted from his engine being struck by the said cars, then I charge you that there can be no recovery in this case, because the said Wright assumed the risk incident to the same, and your verdict, if you find as I have stated, should be for the defendant, The Y. & M. V. Railroad Co."

10. In not sustaining the fifth assignment of error upon the record in this cause which charged error on the part of the District Court *further* in refusing to charge the jury as requested by the defendant below as follows:

"Recovery in this case is sought under the provisions of what is known as 'The Employers' Liability Act,' enacted by the Congress of the United States, and approved April 22, 1908.

"I charge you that the effect of the said act is not to interfere with the rule existing at common law upon the question of assumption of risk as that doctrine applies in this case. In other words, the only effect—that statute was to abolish the assumption of risks of employment in any case where violation by such common carrier of a statute enacted for the safety of employes contributed to the injury or death of such employe. Therefore, I charge you that the said act does not affect the doctrine of assumption of risk as it applies in this case growing out of the movement of cars or trains in the company's yards, the occupying blocking or obstructing sidings, switches or other tracks than the main line tracks in the yards of the company, and that if the plaintiff was injured by projecting, and he was so injured, and he saw them, or

his attention was called to them, that your verdict must be for the defendant."

11. In not sustaining the said fifth assignment of error upon the record in this cause which charged *further* error on the part of the District Court in refusing to charge the jury as requested by the defendant below as follows:

> "If you find from the proof that D. C. Wright was the engineer in charge of an extra freight train, and that said train entered the yards of the company at Gwin, and if the said Wright, attempting to pass cars upon a side track, or scale track, the collision occurred which resulted in his injury and death, and you further find that said Wright knew, or by the exercise of ordinary care could have discovered, that the said cars on the side or scale track were within striking distance of the engine, or if he was warned or advised that his engine could not pass said cars without striking them, and you further find that he undertook to pass said cars, then I charge you that he assumed the risk of safely passing the said cars and if he was injured as a result thereof there can be no recovery by the plaintiff in this case, and your verdict should be for the defendant."

12. In not sustaining the eleventh assignment of error (p. 113), which was based upon the error of the District Court in charging the jury at the request of the plaintiff below as follows:

> "I charge you that there is a count in plaintiff's declaration charging that the other agents

and servants of the defendant company were negligent in not warning plaintiff's intestate of the danger sooner, and it is contended by the plaintiff that the fireman was negligent in assuring the deceased that all was all right and in afterwards failing to notify deceased of the danger in time to stop his engine. I charge you if you find that the fireman was negligent in this respect and his negligence was the proximate cause of the injury then you must find for the plaintiff."

13. In holding that, without regard to whether the Employers' Liability Act abolished the defense of assumption of risk, the facts in the case were not sufficient to sustain that defense.

14. In refusing to hold that the master, defendant below, fully discharged its duty to the plaintiff's intestate when it promulgated and put into effect the rule shown on page 61 (65) of the record, same being rule 523 and reading:

"Trains and engines must be run with caution when entering or moving through sidings or yard tracks, expecting to find them occupied."

15. In holding that the record in this cause justified or warranted a verdict and judgment in favor of the plaintiff below, for that the facts proven at the trial and shown in the record clearly indicate that the situation which caused the death of the plaintiff's intestate was a situation which was apparent to him on entering the yards, and that failing to ex-

ercise any care to protect himself he was the author of his own injury.

16. In holding that the record in this cause justified or warranted a verdict and judgment in favor of the plaintiff below for that the facts proven at the trial and shown in the record clearly indicate that the plaintiff's intestate was fully aware that there was a risk or danger of his engine striking the car on the track ahead of him, and that without determining whether he could safely pass said car or not and with full knowledge or means of knowledge that he might not be able to pass with safety took the chance and, therefore, voluntarily assumed the risk which it was wholly unnecessary for him to have assumed.

BRIEF.

1. It being conceded that this case involves no violation by the defendant (plaintiff in error) of any safety appliance act, the defense of assumption of risk is open as at common law.

Record, p. 77 (83).

Seaboard Air Line v. Horton, 233 U. S., 492.

So. Ry. Co. v. Crockett, 234 U. S., 725.

2. The defense of assumption of risk was duly pleaded, was urged during the trial, was set up in the motion for a new trial, was assigned as error in the Circuit Court of Appeals, was made the basis of elaborate argument in the latter Court, and was set up in the assignments of error in this Court.

Opinion of the C. C. A., p. 122 (135).

3. Among the rules prescribed for the protection of engineers was one requiring them to move their trains with caution over yard tracks "expecting to find them occupied." That tracks in railroad yards are very frequently wholly or partially occupied with cars and that such was true of this particular yard was not controverted. The deceased engineer, for several years past, had frequently operated through these yards, and knew the usual situation there. The risk was, therefore, one ordinarily incident to his employment and was assumed by him.

Record, pp. 46, 65-66, 67, 68.

4. Even where the situation which was responsible for the accident was due to the master's negligence, yet if the situation was observed by the engineer or was so obvious that an ordinarily prudent person would have seen and appreciated it, then the servant is held to have assumed the risk and cannot recover.

Washington, etc., R. Co. v. McDade, 135 U. S. 234.

Choctaw, etc., R. Co. v. McDade, 191 U. S. 68.

T. & P. Ry. v. Harvey, 228 U. S., 321-324.

S. A. L. Ry Co. v. Horton, 232 U. S., 292.

T. & P. Ry. Co. v. Archibald, 170 U. S., 673.

5. Where the knowledge of the situation on the part of the servant is equal to that of the master and he afterwards voluntarily encounters it, he assumes the risk and cannot recover.

Fletcher v. Railroad, 102 Tenn., 7.

3 *Labatt's M. & S.*, Sec. 1184.

6. The doctrine of assumption of risk is not confined to risks existing at the time the contract of employment was entered into, but applies to dangers which subsequently arise and which became known to the employe or which were so plainly observable that he must be presumed to have known them.

S. A. L. Ry. v. Horton, 233 U. S., 492.

Railroad v. Ponn, 191 Fed., 682.

7. In the instant case, upon entering the lead track from which, some distance down, diverged the scale track on which stood the offending coal car, the deceased engineer had full opportunity to and did observe the situation. A doubt arose in his mind as to whether he could safely pass. This doubt exhibited itself in repeated inquiries thereafter by him of the fireman up to a point within 60 feet of the car, as to whether he could pass. With his train under control, he elected to take the chance of passing safely. Therefore, he assumed the risk.

8. The learned Court of Appeals reviews the evidence and states its findings (pp. 122-123) and then denies that there was any assumption of risk, because there was nothing to show that the engineer "was chargeable with the knowledge of the danger and voluntarily exposed himself to it" (p. 123). From those findings, however, it appears that the situation, whatever it may have been, was perfectly obvious to any one on the engine; that the time was broad daylight (3:00 p.m.) and that the track on which the offending car obtruded was perfectly straight for a distance of 1,600 feet. The deduction of the Court of Appeals from the facts it stated was clearly error. For "the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employe."

Choctaw, etc., R. Co. v. McDade, 191 U. S. 68.

9. Plaintiff's case cannot be saved by the claim that it was a matter of contributory negligence and not assumption of risk. For, if there was an assumption of risk, it embraced not only the risk arising from the obvious and patent negligence of the master, but also from the conduct of the servant himself in dealing with the situation.

S. A. L. Ry. v. Horton, 233 U. S., 492.

Infra, pp. 50 *et seq.*

10. The foregoing propositions have been on the premise that there was negligence on the part of the master. In view of the fact that the accident occurred in the yards which were not for transportation but for switching movements and storage of cars only and the tracks in which were necessarily and constantly more or less occupied, wholly or partially, the Railroad Company was not chargeable with negligence merely because a car on one track protruded on another track. Engineers were warned that they must expect to find such conditions and instructed to act accordingly.

Record, p. 61 (65).

Infra, pp. 64-66.

11. There was no negligence on the part of the fireman for he did his full duty.

Opinion of the C. C. A., p. 125 (139).

12. There being testimony which clearly went to show assumption of risk by the decedent (in our opinion, justifying a peremptory instruction for the defendant), the learned Circuit Court of Appeals should not, in view of the error of the trial court, have affirmed the case on the ground that the evidence showed no assumption of risk, but should have remanded the case for a submission of that question to the jury at least.

Slocum v. N. Y. Life Ins. Co., 228 U. S., 387.

ARGUMENT.

The following propositions are submitted as decisive of this controversy and as sustained by the record and the authorities:

1. In view of the rule, and the warning thereby given, that trains must be run with caution over yard tracks "expecting to find them occupied" and of the situation uniformly prevailing in this and other railroad yards as depicted by the uncontroverted testimony of several railroad superintendents, the risk here (a coal car protruding slightly over a lead track in a yard) was one naturally incident to the occupation and, therefore, assumed by the engineer—particularly since this engineer had, for several years, been familiar with the yard in question.

2. Risks not naturally incident to the occupation and arising out of the failure of the employer to use due care are assumed by the employe after he becomes aware of the defect or disrepair and of the risk arising from it or where the defects and risks alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.

3. The undisputed facts in the record and the finding of the Court of Appeals all clearly show that the danger arising from the protrusion of the coal

car over the lead track in this case was not only so plain and obvious that any ordinary prudent person under the circumstances would have observed and appreciated it, but that it was actually seen and observed by the engineer—in ample time to have avoided the consequences.

4. The doctrine of last clear chance. For after the alleged negligence of the master had occurred and after the engineer was fully cognizant of it and with abundant opportunity on his part to avoid the consequences he deliberately ecountered them.

5. There was an assumption of risk rather than contributory negligence on the part of the engineer. He seems to have looked out for and to have observed the situation and had his train under control. His death was due to the fact that he voluntarily entered into a situation clearly apparent to him.

The Defense Properly Asserted.

Before entering upon a discussion of the propositions just stated, it may be proper to point out that this question of assumption of risk was the principal and vital element in the defense of the case at bar and was insisted upon by the defendant at the trial, not merely by the motions for a peremptory instruction (pp. 55, 79) and by the requests for special instructions above quoted (*infra*, pp. 13-19), but also by a special exception to the charge as given (p. 86).

The action of the trial court in these respects was also complained of specifically in the motion for a new trial (pp. 92-100) and was made the basis of numerous assignments of error in the Court of Appeals (pp. 104-114).

And the brief of counsel for the Railroad Company in the Court of Appeals was almost wholly devoted to the proposition that the trial court was in error in excluding from the jury the defense of assumption of risk. As observed by the learned Court of Appeals (p. 122):

> "Defendant's counsel pressed this claim (of assumption of risk) throughout the trial of the case; and it has been given paramount attention in this Court, both upon brief and in oral argument."

This case is, therefore, in no respects like the case of *Southern Ry. v. Gadd*, 233 U. S., 572, in which the defense of assumption of risk was advanced by the Southern Ry. Co. at the last moment in this Court without having been urged before either the trial court or the Circuit Court of Appeals.

Rationale of Doctrine of Assumed Risk.

Ever since, if not long before, the decision in *Thomas v. Quartermaine*, L. R., 18 Q. B. Div., 685, the doctrine of assumption of risk as applied to known dangers, whether arising from the master's negligence or not, has been held to rest largely on

the maxim *volenti non fit injuria*. There is no more pertinent illustration of this than that found in the case of *Meller v. Mfg. Co.*, 150 Mass., 362, the opinion in which was written by Chief Justice, now Mr. Justice Holmes, which concluded with this expression:

> "The duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognizant of the full extent of the danger and voluntarily run the risk."

The same view was adopted and applied in a later case in which a servant was injured by falling from a run along which he was employed to wheel coal and which was without guards to prevent his falling off. It was contended there was no assumption of risk because of the statute which made the employer liable for injuries to servants from defects in ways, works or machinery. After saying that the case was clearly one of assumption of risk under the common law, the Court added:

> "But it is contended that under the statute referred to the rule is different. It is well settled that, in the absence of a special contract affecting the rights and liabilities of the parties, the statute has taken away from the defendants, in the cases mentioned in it, the defense that the injury was caused by the act of a fellow servant of the plaintiff. It is also established by an adjudication of this Court, and by decisions under a similar statute in England, that it has not taken away the defense that the plain-

tiff, knowing and appreciating the danger, voluntarily assumed the risk of it."

O'Maley v. Gas Co., 158 Mass., 135.

Among other leading and interesting cases emphasizing the principle of *volenti non fit* are the following:

St. Louis Cordage Co. v. Miller, 126 Fed. Rep., 506.

B'gham Ry. Co. v. Allen, 99 Ala., 359.

Gleason v. New York, etc., R. Co., 159 Mass., 68.

Kleinest v. Kunhardt, 160 Mass., 230.

This Risk Naturally Incident to the Occupation.

Attention has already been invited to Rule 523 (p. 61) which read:

"Trains and engines must be run with caution when entering or moving through sidings or yard tracks, expecting to find them occupied."

The movement in question here was not along a main line, nor along any line where transportation, in its more proper sense, was intended to occur, but was in a yard which is used solely for the purpose of making and breaking up trains and switching and storing cars. None of the considerations which require a track to be free from obstruction existed.

The situation usually prevailing in railroad yards of this character and the reason and purpose of the

rule mentioned are referred to by Mr. Dubbs, a supernitendent of the defendant company (pp. 60-66), by Mr. Walsh, Superintendent of Terminals for the "Frisco" at Memphis (p. 67), and by Mr. Pelter, Superintendent at Memphis for the Southern Ry. Co. (p. 76).

These gentlemen point out that engines work in the yard limits not on schedule as they do on the main line nor on orders, but are required to keep their trains always under control so that the movement of each will not be interfered with by another. *They must expect the tracks in the yard to be wholly or partially occupied.*

This being the situation common at this particular yard of the plaintiff in error and common to all railroad yards, and the deceased engineer having been long familiar with the yards at this point, the protrusion of a coal car over the lead track was a danger commonly occurring and naturally incident to the operation of a train in the terminals and he assumed it.

Employe Assumes Obvious Risks.

In the Horton case (223 U. S., 492), this Court, after pointing out that the engineer assumed the risks necessarily attendant upon the nature of his work, whether aware of them or not, when they were

not the result of negligence on the part of the employer, said:

> "But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them."
>
> *S. A. L. Ry. Co. v. Horton*, 232 U. S., 292.

In the case at bar, the deceased engineer, in ample time to avoid harm, "became aware of the defect or disrepair and of the risk arising from it." In addition, the defect and the risk alike were "so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them." Indeed he did observe and appreciate them, as indicated by his repeated inquiries of his fireman. Whether he thought his engine would clear the offending car or that his engine would push it out of the way, will never be known. It is clear, however, that with a full knowledge and abundant means of knowledge, he deliberately elected to take the chance.

In the McDade case (191 U. S., 68), this Court made the following observation:

> "The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties. The employe is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employe, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continue in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and, in such case, cannot recover."
>
> *Choctaw, etc., Ry. v. McDade*, 191 U. S., 68.

In *Texas, etc., Ry. v. Harvey*, which was an action for the death of a hostler's helper, caused by his head, which protruded from the window of the engine cab, coming in contact with a post maintained by the Railroad Company near the track, this Court said:

> "At the common law a servant assumes the ordinary risks of his employment, but he is not obliged to pass upon the methods chosen by his

> employer in discharging the latter's duty to provide suitable appliances and a safe place in which to work, and he does not assume the risk of the employer's negligence, in performing such duty. This rule is subject to the exception that where a defect is known to the employe, or is so patent as to be readily observed by him, he cannot continue to use the defective appliance, in the face of knowledge and without objection, without himself assuming the hazard incident to such a situation. If a defect is so plainly observable that the servant may be presumed to know its existence, and he continues in the master's employment without objection, he is said to have made his election to thus continue, notwithstanding the master's neglect, and in such a case he cannot recover."
>
> *T. & P. Ry. v. Harvey*, 228 U. S. 321-2.

Further, in the same case, the Court added:

> "If the doctrine of assumed risk applied to this case, it was because the alleged defect was so palpable and visible that Harvey was presumed to know of it, although there was no direct proof upon the subject, and, by continuing work, to have taken upon himself the hazard of injury from that source."
>
> *T. & P. Ry. v. Harvey*, 228 U. S. 324.

This last expression quite fits the conceded facts in the case at bar. The defect which confronted this engineer was visible and palpable. He had the option to abandon his work for a few minutes, but he elected to continue without making objection.

In *Washington, etc., Ry. Co. v. McDade,* 135 U. S. 234, this Court quoted from *Myers v. Hudson Iron Co.,* 150 Mass., 125, as follows:

> "The risk of the safety of machinery is not assumed by an employe 'unless he knows the danger, or unless it is so obvious that he is presumed to know of it.' "

Referring to that classes of cases in which the employe is held to have assumed the risk, although the employer was guilty of negligence, Mr. Justice Holmes, speaking for this Court, has said:

> "In this class of cases the risk is said to be assumed because a person who clearly and voluntarily encounters it has only himself to thank if harm comes, on the general principle of our law."
>
> *Schlemmer v. Buffalo, etc., R. Co.,* 205 U. S. 12.

It is difficult, we respectfully say, to suppose a case in which it was more clear than in the case at bar that the employe "voluntarily encountered" the danger through which harm came to him. For as pointed out by the Court of Appeals (p. 122) the train was under control. The engineer indicated that he had the condition of the offending coal car in mind when 200 feet and again when 60 feet away. The train was admittedly moving between three and four miles an hour and that it could have been stopped within less than 40 feet is not disputed. (pp. 71-72.) Clearly he "voluntarily encountered" the situation.

His assumption of the risk was accentuated by the fact that one of the company's rules, of which he well knew, provided that "*in all cases of doubt or uncertainty, the safe course must be taken and no risks run.*" (p. 62.)

In *Central Vermont R. Co. v. Bethune* (C. C. A.) 206 Fed. Rep. 868, the plaintiff was a car sealer whose duty is was to take the number of seals and cars passing White River Junction. The plaintiff claimed that at that point the defendant maintained three tracks nearly parallel so close together and so negligently constructed as to endanger the lives and limbs of employes who might have occasion to stand or pass between trains on those tracks; that while standing between those tracks in the discharge of his duties he was injured in consequence of their proximity and because of the negligent operation of a train thereon. The Circuit Court of Appeals held that the lower court was in error in declining to submit to the jury the question of assumption of risk.

In *Freeman, Receiver, v. Powell* (Tex. Civ. App.), 144 S. W. Rep. 1033, the employe of the receiver in interstate commerce was attempting to lift a block of ice out of an ice box and while thus engaged he stumbled and was injured by a falling block of ice. The alleged negligence was the failure on the part of the receiver to furnish proper ice hooks with which to handle the ice. It appeared that for some time

he had been handling ice in the same way as when he was injured. The court, after holding that the Federal Act applied, held that the case was one of assumption of risk.

———o———

Many well reasoned cases hold to the view that the knowledge on the part of the servant which is necessary to give rise to an assumption of risk on his part, is not absolute knowledge—but relative as compared with that of the master. In other words, if the knowledge on the part of the servant of the danger or defect is equal to that of the master then, by accepting the situation, he assumes the risk. As stated by the Tennessee Supreme Court:

> "It is said it was error to charge that if plaintiff's knowledge of the competency or incompetency of Rollins was equal to that of the defendant, there could be no recovery if he asked for or accepted his assistance without protest or objection. This, we think, is good law. If a servant know that he is working with defective tools or unsafe appliances, or with incompetent fellow-servants, and have the same knowledge as the employer, he is not entitled to recover because of injuries arising out of such defects or incompetency. *Wood's Master and Servant*, secs. 419, 422; *Bailey's Master and Servant*, sec. 422."
>
> *Fletcher v. Railroad*, 102 Tenn. 7.

Mr. Labatt's statement of the rule in this connection is:

> "Sec. 1184. The servant is frequently said to be incapable of maintaining the action where his knowledge of the risk which caused his injury was, as compared with the master's knowledge, either equal, or superior. (Citing a large number of cases.) But this form of expression is obviously of no special signficance in a logical point of view. If the servant knew of and appreciated the risk in such a sense and to such an extent that he must be deemed to have accepted it as one of those incident to the employment, his inability to maintain the action is a necessary inference, irrespective of whether his master possessed the same or a less amount of information in regard to the subject-matter. As it is the knowledge of the servant which withholds from him a right of action, it is immaterial that the master also knows of the conditions which produce the injury."
>
> 3 *Labatt's M. & S.*, Sec. 1184.

———o———

T. & P. Ry. v. Swearengen, 196 U. S. 51, Distinguished. The case at bar is distinguishable from the Swearengen in every essential particular. There, the injured man, a switchman, testified for himself that the accident occurred at 6:45 p.m., of February 7th "after dark." He had just thrown the switch and was riding on a box car, his feet on the stirrup and his hands on the handholds at the side of the car. "I was looking back east for a signal

from the yard master which I was required to do," and while in this position came in contact with the scale box, injuring his head. He had only been working seven days and had never used the track at that point; he had never seen a car on the track opposite the scales, "and never had my attention called to the distance between the track and the scale box. I never measured or approximated the distance to it. Nothing ever occurred to attract my attention to it. I knew we had to pass the scale box at the time I was hurt, * * * * but I was not thinking about it." On such testimony this Court held that the trial Court was right in submitting to the jury the question whether the injured employe has assumed the risk.

In the case at bar, not only was the engineer familiar with the general situation in the yards at Gwin, Miss., having often operated through them, but the position of the offending coal car was in plain view to him. The lead track on which his engine was moving was practically straight for 1,600 feet from where it left the main line down to the offending coal car, the time was three o'clock in the afternoon—broad daylight. Not only this, but *his attention was specifically directed to the presence of the offending* car and of the possible danger therefrom, as indicated by his repeated inquiries of his fireman as to whether he could pass.

Even in the Swearengen case, this Court held that it was a question for the jury, not merely as to whether the scales were maintained in a reasonably safe place, but also "*whether the plaintiff had notice thereof.*" In the course of the opinion, the Court said:

> "The Court of Appeals was of the opinion, and rightly, we think, that the dangerous contiguity of the scale box to track No. 2, and the extra hazard to switchmen resulting therefrom, was not so open and obvious on other than a close inspection, as to justify taking from the jury the determination of the question whether there had been an assumption of the risk. The plaintiff was entitled to assume that the defendant company had used due care to provide a reasonably safe place for the doing by him of the work for which he had been employed, and as the fact that the defendant company might not have performed such duty in respect to the scale box in question was not so patent as to be readily observable, the court could not declare, in view of the testimony of the plaintiff as to his actual want of knowledge of the danger, that he had assumed the hazard incident to the actual situation."

So that every fact which this court assigned as justifying the trial court there in refusing to instruct peremptorily that the employe had assumed the risk—the darkness, the employe's unfamiliarity with the general and with the particular situation, the fact that he was not aware of nor thinking of the dangerous proximity of the obstruction—were all

absent in the case at bar. For here there was daylight, perfect familiarity on the part of the employe with the particular situation, and *an actual observance and appreciation* by him of the obstruction and the danger it created.

The opinion in the Swearingen case concluded with this important statement:

> "As we have already decided that knowledge of the increased hazard resulting from the dangerous proximity of the scale box to the north rail of track No. 2 could not be imputed to the plaintiff simply because he was aware of the existence and general location of the scale box, it was for the jury to determine, from a consideration of all the facts and circumstances in evidence, whether plaintiff had actual knowledge of the danger."
>
> *Texas, etc., R. Co. v. Swearingen*, 196 U. S. 63.

In the case at bar, the opinion of the learned Court of Appeals is equivalent to a holding that although the accident occurred in broad daylight and the entire situation was perfectly obvious to the engineer and although his inquiries of the fireman indicated that he *observed the situation and realized its possible dangers*, still there was no question as to whether he assumed the risk. In effect it means that the trial court would have been correct in charging the jury peremptorily that, under the facts, that the decedent did not assume the risk.

Risks Arising After Employment.

The doctrine of assumption of risk is not at all confined to risks existing at the time contract of employment was entered into, but applies to all dangers which subsequently arise and which became known to the employe or which were so plainly observable that he must be presumed to have known them. In this connection it was observed in the Horton case:

> "But by the common law with respect to the assumption by the employe of the risk of injuries attributable to defects due to the employer's negligence, when known and appreciated by the employe, and not made the subject of objection or complaint by him, it is quite immaterial whether the defect existed when the appliance was first placed in his charge, or subsequently arose."
>
> *S. A. L. R. Co. v. Horton*, 232 U. S. 292.
> *See also Railroad v. Ponn*, 191 Fed. 682.

The Risk Was Obvious.

It is our view that the evidence of his knowledge was so clear that the trial court should have granted the defendant a peremptory instruction. But for the purposes of argument here, it is enough to say that there was evidence of such knowledge on the part of the engineer, which, at the least, required the submission of the question of fact to the jury.

Sylvester Johnson, a colored brakeman, testified for the defendant (pp. 72-75) that he was the brake-

man on this train working on the head end; that he threw the switch in order for the train to leave the main line and take the lead track, and immediately on doing so, mounted the engine and stood on the gangway just in the rear of the engineer *and on the engineer's side of the engine* (p. 73). He further said:

"Q. Both of you looking the way the train was going?"

"A. Yes, sir.

"Q. Did you see any cars near the track on which your train was going?

"A. Yes, sir.

"Q. Now, just tell the jury what you saw, and what you said, if anything?

"A. I was looking ahead and seed them, and I spoke to him and told him it didn't look like them cars was in the clear.

"Q. Whom did you make this remark to?

"A. Mr. D. C. Wright.

"Q. You told the engineer

"A. Yes, sir.

"Q. Then what was said and what was done?

"A. I spoke and told him of it, and he asked the fireman was they clear, and the fireman was putting in the fire at the time, and when he got through, he looks ahead, and he told him they wouldn't clear, and he didn't understand the fireman and he asked me what he said, and I said he said they wouldn't clear, and the fireman had done jumped off, and he leaves his side to go to the fireman's side to see if they would clear, and I jumped off after he left his side."

Record, p. 74 (80).

The only answer made by the plaintiff to this evidence is that it is not true—that the brakeman was not on the engine. No witness denies it, however, except the fireman, C. W. Johnson. While he said (p. 77-78) that Brakeman Johnson was not on the engine, he admitted that was the proper place for him to have been.

Aside, however, from the direct testimony of the brakeman, just quoted, the testimony of Fireman C. W. Johnson, when read as a whole, clearly indicates that from the time Engineer Wright entered upon this lead track he realized the possibility of collision and entertained a serious doubt as to whether his engine could pass. As the fireman expressd it (p. 37): "they looked like they would clear and they didn't look like they would clear." And, as stated by the trial judge (p. 103): "He (the engineer) was doubtful about being able to clear the cut of cars when he first saw it."

The following proposition, by Mr. LaBatt, is supported by any number of authorities:

> "A servant will be affirmed or denied to be chargeable with knowledge of a given risk, according as it is considered that a reasonably observant person possessing his natural and acquired capacity for observation would or would not have ascertained the existence of that risk, if he had made a proper use of the means or op-

portunities of knowledge which were available before the injury in suit was received by him.

* * *

"If there is any evidence going to show that the servant had an opportunity of ascertaining the existence of the risk in question, the employer is entitled to have the jury instructed to the effect that a servant having an opportunity to know of a risk is presumed to know of it."

4 *Labatt's M. & S.*, Sec. 1320.

As already indicated (*supra*, p. 2), there is no dispute about the facts. The time was broad daylight —three o'clock in the afternoon. The lead track on which the engine was moving was practically straight from the point where it diverged from the main line to the point where the offending coal car stood, 1,600 feet away, and there were no obstructions intervening. Presumably, the engineer looked ahead, as it was his duty to do, and saw these cars in close proximity to the lead track. When 200 feet from the coal car he asked his fireman whether he could pass. At that moment his engine was moving three or four miles an hour and could have been stopped by the use of the ordinary service application within 25 or 34 feet (pp. 71-72). An emergency application would have stopped the train even more quickly. The engine moved on and when a distance of at least 60 feet from the offending car the engineer again asked his fireman whether he could pass. At this point the train was moving three or four

miles an hour, and, as just indicated, could have been stopped some distance from the coal car.

That the foregoing is a correct analysis of the facts appears from the following statement in the opinion of the Court of Appeals (p. 122):

> "It is important to inquire into the conditions attending the accident. The train in question left the main track some 1,600 feet north of the point of collision and was moved southwardly along the main lead track of the yards until it reached a point something like 200 feet north of the coal car, when, it is claimed, the engineer had the coal car in full view and could determine whether his engine would or would not clear it. The evidence tends to show that the engineer had his train under control. Indeed, the steam was shut off and the train slowed up at or near the point last mentioned."

Accepting as correct the proposition of law quoted from Mr. Labatt (*supra*, p. 45) and applying it to this situation, can it be reasonably doubted that the jury should have been allowed to say whether the engineer "had an opportunity to ascertain the existence of the risk in question."

Indeed, his opportunities for knowledge were so clear and his actual knowledge so clear that the trial court should have peremptorily instructed the jury that he assumed the risk.

The view of the learned trial judge, expressed on the motion for a new trial, is indicated by the following excerpt from his opinion at p. 103:

> "He was doubtful about being able to clear the cut of cars when he first saw it, and all he did was to inquire of the fireman and flagman if he could clear. He was informed that he could not, but too late to stop his train and avoid the collision. Had he observed the rule of the company, that when in danger, take the safe course, he probably would be alive today. He should have stopped his train or put it under complete control when he first saw the cars and the question arose in his mind as to his ability to clear them, and have investigated the situation. He did not do so, but proceeded with his train until he reached a point so near the cars that it was then impossible to stop and avoid a collision. He lost his life, for which he was not blameless."

In view of the finding of the Court of Appeals that "the evidence tends to show that the engineer had his train under control" (p. 122), and in view of the undisputed facts in the case as to the speed of the train, its distance from the offending coal car when the engineer made his inquiries of the fireman, and the distance in which he could have stopped his train—all pointed out, *infra*., p. 36,—it is clear that the engineer did have his train under control.

We think, therefore, that the learned trial judge simply drew the wrong conclusion from admitted facts. As he points out, the engineer was doubtful

about being able to clear the car. He could have saved himself by observing the rule that when in danger take the safe course. He could easily have stopped his train even after his second inquiry. Instead, he elected to take the chance of passing and thereby brought on his own death. It was a case in which, to use the expression of Mr. Justice Holmes, he "voluntarily encountered" the situation through which harm came to him—a situation the nature of which was obvious to him.

Specific Rules as to Cases of Doubt.

Among the rules promulgated by the defendant company for the protection of its employes and which had been brought to the attention of Engineer Wright, was this:

> "106. *In all cases of doubt or uncertainty, the safe course must be taken and no risks run.*" Record, p. 62 (66).

Assuming, for argument's sake, that the Railroad Company was guilty of negligence in allowing the coal car to protrude over the lead track, it appears from the finding, both of the trial court and of the Court of Appeals, that the engineer saw the situation and was "in doubt." If he had followed the specific requirement of the rule just quoted the accident would never have occurred. He, therefore, not merely assumed the risk, as that term is ordinarily used in law, but deliberately violated the rule which

required him, in just such a case, to take the safe course "and run no risks."

Assumption of Risk and Contributory Negligence Distinguished.

It seems to be the principal contention of the plaintiff that the facts present a case of contributory negligence and not of assumption of risk—as a result of which, the plaintiff's cause of action is not barred, but the recovery reduced. Such seems to have been the view taken by the trial court, who required a remittitur of $9,000.00 from the verdict of the jury on account of decedent's contributory negligence.

While the authorities all agree that cases may arise involving at once assumption of risk and contributory negligence, they seem to be also agreed that if one or the other operates as a bar, the plaintiff's case is concluded thereby.

St. Louis Cordage Co. v. Miller, 126 Fed. Rep., 502.

It would be anomalous under the Federal Employers' Liability Act if an employe, in whose case there exists both contributory negligence and assumption of risk, could recover on the ground that contributory negligence merely went in mitigation of damages while another employe, whose case involved an assumption of risk and no contributory negligence whatever, would be absolutely barred.

Contributory negligence and assumption of risk are two distinct defenses and have often been so declared.

Choctaw, etc., R. Co. v. McDade, 191 U. S. 61.

St. Louis Cordage Co. v. Miller, 126 Fed. Rep., 505.

In many cases the two defenses shade into each other so that the line of distinction is shadowy. Attempts to state the distinction have never resulted satisfactorily and the courts have uniformly said that every case must be determined upon its own peculiar facts rather than by an attempt to follow refined definitions.

However, before proceeding to review the authorities, the following observations may be pertinent:

Assuming, as we think must be done, that the risk in this case was obvious, it may have been an act of negligence on the part of the engineer to encounter it. But the uniform expressions of this court and of practically all the courts, indicate clearly that the master's non-liability in such a case rests not upon the theory that the employe was negligent in entering the situation, but upon the theory that by remaining in the employment after knowledge of the situation, he voluntarily accepted the consequences. In other words, recovery by him is precluded by the principle of *volenti non fit.* For, in all cases involving assumption of risk, there is necessarily an ele-

ment of negligence on the part of the employe in the very fact of his remaining in the service after knowledge of the defect. In such cases, however, the courts have never placed the non-liability of the master on the ground of the servant's negligence, but on the ground that, by his failure to object and by his continuing in the service, he had accepted the situation and consented to whatever injury might follow.

This confusion of assumption of risk and contributory negligence presented itself in the Horton case (233 U. S., 492), as indicated by the following excerpt from the opinion:

> "Defendant specifically requested an instruction that plaintiff's right to recover damages was to be determined by the provisions of the Federal Act, and that 'if you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass, and the condition of the glass was open and obvious and was fully known to plaintiff, and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue "yes."' The court gave this instruction as applicable to the issue of contributory negligence, and instead of the words, 'then the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue "yes,"' used the words, 'then the court charges you that the

> plaintiff was guilty of contributory negligence, and you will answer the third issue "yes." To the refusal to give the instruction as requested, and the modification of it, defendant excepted."

It was held that this action of the trial court was error; that the instruction as requested should have been given.

S. A. L. Ry. v. Horton, 233 U. S. 492.

It seems to be clear that if the circumstances are such as to indicate the employe assumed the risk, then his recovery is barred without regard to whether the risk was complicated by the employe's contributory negligence. In such case he is deemed to have assumed the risk, *not merely of the the obvious negligence of his master, but of his own negligence in handling the situation confronting him.* As observed by Mr. Justice Harlan in the Kane case:

> "It is undoubtedly the law that an employe is guilty of contributory negligence which will defeat his right to recover for injuries sustained in the course of his employment, where such injuries substantially resulted from danger so obvious and threatening that a reasonably prudent man, under similar circumstances, would have avoided them if in his power to do so. He will be deemed, in such case, to have assumed the risk involved in such needless exposure of himself to danger."
>
> *Kane v. Northern Central R. Co.*, 128 U. S. 91.

> "The doctrine of assumed risk obtains without necessary reference to the existence of negligence. If the servant, with knowledge of a defect in the master's premises, and of the danger and risk incident thereto, continues in the service of the master without proper notice to the latter, he assumes the risk incident to the service and growing out of the existence of the defect, and this without regard to the degree of care which he may exercise in the performance of his labors."
>
> *Texas, etc., Ry. v. Conroy*, 83 Tex. 214.

The view of this court in the case of Choctaw R. Co. v. McDade is best shown by the following excerpt from the opinion. That case was one in which a brakeman was riding, in discharge of his duties, on the top of a furniture car and was killed by coming in contact with an over-hanging water spout. The court, after pointing out that the rule to the effect that the servant did not assume the risk arising out of his employer's negligence, was subject to exception where the defect was known to the employe or was so patent as to be readily observed by him, said:

> "In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and, in such case, cannot recover. The charge of the court upon the assumption of risk was more favorable to the plaintiff in error than the

> law required, as it exonerated the railroad company from fault if, in the exercise of ordinary care, McDade might have discovered the danger. Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employe."
>
> *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 68.

The decision in the Horton case is to the effect that an employe who voluntarily uses an appliance that is unsafe—that is to say, an appliance which contains a potentiality of danger—assumes the risk of such danger. His right of recovery in such a case is barred altogether because there was an assumption of risk. If the theory urged by the defendant in error here had been applied in the Horton case, it would have been held that Horton was guilty of contributory negligence in failing to have the unsafe appliance remedied and his right to recover would have not been barred, but his negligence would merely have gone in mitigation of damages. This Court, however, as was done in all earlier cases of like character, placed the non-liability of the master—not on the ground that the employe was guilty of negligence in his handling of the situation that confronted him—but on the ground that he had assumed the risk.

S. A. L. Ry. v. Horton, 232 U. S., 292.

The same principle determines the instant case. The engineer, Wright, continued to use a track which had in it a potentiality of danger which was manifest to him. His election to continue the use of this defective track constituted an assumption of risk and made a case of *volenti non fit*. Whether it was accompanied with negligence on his part is not material since his assumption of risk embraced not merely the situation that was obvious to him, but his own conduct with respect to it.

Kane v. Railroad, 122 U. S., 91.

The case of B. & O. R. R. v. Baugh, was one in which a fireman sought to recover damages for injuries received while riding on a locomotive which he alleged was negligently operated by the engineer. The engineer's negligence lay in the fact that he undertook to run this switch engine on the main line without special orders and without adopting the precautions necessary to protect an engine on a trip of that kind. The fireman's right to recover was denied—not on the ground of his contributory negligence in undertaking to make such a trip, but because his knowledge of the situation was equal to that of his master so that he voluntarily assumed the risk.

B. & O. R. R. v. Baugh, 149 U. S., 390.

Last Clear Chance.

This doctrine, often stated and applied and which is somewhat co-related to that of assumption of risk, is, we think, clearly applicable to the situation presented here. The doctrine is based on the theory that even though the negligence of the defendant is clear and undoubted, still if the other party, after such negligence had come about, had full knowledge thereof and ample opportunity to escape its effect, the law will cast the loss on the party who had the last clear chance to avoid it. As recently stated by high authority, the rule is:

> "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it."
>
> 2 *Quarterly Law Review*, p. 207.
>
> *Davies v. Mann*, 10 M. & W., 546.

Principle of Slocum v. New York Life Ins. Co.

Bearing in mind that although the principal defense pleaded by the defendant was assumption of risk, the District Judge excluded that defense—that he not only did not allow the jury to say whether the facts sustained that defense, *but did not himself decide whether the facts sustained it*—we respectfully say that, under the doctrine of the Slocum case, the Court of Appeals erred in undertaking to decide for the first time, the question of fact instead of re-

manding the case to the trial court so that that issue might be tried by a court and jury.

Slocum v. N. Y. Life Ins. Co., 228 U. S., 364.

The following excerpts from the opinion in the Slocum case are pertinent:

> (P. 387) "In principle, these cases are decisive of the question arising on the motion for judgment on the evidence notwithstanding the verdict. They show that it is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence; and that while it is the province of the court to aid the jury in the right discharge of their duty, even to the extent of directing their verdict where the insufficiency or conclusive charter of the evidence warrants such a direction, the court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact. In other words, the constitutional guaranty operates to require that the issues be settled by the verdict of a jury, unless the right thereto be waived. It is not a question of whether the facts are difficult or easy of ascertainment, but of the tribunal charged with their ascertainment; and this, we have seen, consists of the court and jury, unless there be a waiver of the latter."
>
> (P. 398) "Whether in a given case there is a right to trial by jury is to be determined by an inspection of the pleadings, and not by an examination of the evidence. If the pleadings present material issues of fact, either party is entitled to the court and a jury, and this is as true of a second trial as of the first. Whether the evidence is sufficient to sustain a verdict

for one party or the other is quite another matter, and does not affect the mode of trial, but only the duty of the court in instructing the jury, and of the latter in giving their verdict. The issues to which the jury must respond are those presented by the pleadings, and this whether the evidence be disputed or undisputed, and whether it be ample or meager. To speak, therefore, of the evidence as determinative of the right to a trial by jury, is to confuse the test or that right with a different test, applicable only in determining whether a particular verdict should be directed."

Slocum v. New York Life Ins. Co., 228 U. S., pp. 387, 398.

In the case at bar the principal issue of fact raised by the pleadings was not decided by the trial court, but was dismissed by the trial judge from the consideration of either judge or jury.

If we properly understand the opinion of the court in the Slocum case, it was error on the part of the learned Court of Appeals to undertake to decide this issue of fact. It should have reversed and remanded with instructions that the issue be tried before a court and jury. And it would make no difference that the Court of Appeals was of the opinion that on such a trial it would be the duty of the trial judge to give a peremptory instruction against the party asserting the defense.

In other words *a material issue of fact raised by the pleadings cannot for the first time be decided by the appellate court.*

The case would be different here if the trial judge had either decided this issue of fact himself or had allowed the jury to decide it—whether erroneously or correctly. But he did neither, and the learned Court of Appeals was the first tribunal to determine it.

As pointed out by this court in the Slocum case, the question is to be determined *by an inspection of the pleadings* and not by examination of the evidence. The defense of assumption of risk having been pleaded and the issue of fact thus raised, the defendant was entitled to have that issue of fact determined by the trial court and jury, and the Court of Appeals could not—no matter what the facts were—for the first time decide that issue of fact.

It is no answer to the foregoing, we think, to say that the holding of the Court of Appeals was merely that the trial court decided the case rightly, but gave the wrong reason. That does not dispose of the proposition that a material issue of fact raised by the pleadings must, under the rule of the Slocum case, be decided by the jury, even though their decision is dictated by the trial judge.

Trial Court's View of the Case.

That the learned trial judge excluded the defense of assumption of risk—not because the facts did not, in his view, sustain it—but because in his opin-

ion the Federal Act already abolished that defense wherever the injury was due to the negligence of the master, is apparent throughout the record, as stated in the opinion of the Court of Appeals:

> "The learned trial judge held that assumption of risk was entirely abrogated as to persons operating under the Employer's Liability Act."
>
> Record p. 122 (136.)

When the defendant sought to show by witnesses that the tracks in the yard in question were frequently and usually occupied or partly occupied by cars, the court sustained an objection, saying:

> "I have stated that my ruling on the law is that the doctrine of assumption of risk has been abolished by the Act of Congress, except where the carrier or employer is not guilty of negligence."
>
> Record, p. 67 (73).

And in his charge to the jury the learned trial judge, after adverting (p. 87) to the three pleas filed by the Railroad Company—not guilty, contributory negligence, and assumption of risk—and instructing the jury with respect to the first two pleas, added (p. 90):

> "In the view that I have taken of the law as to the third plea, I do not think it proper to charge the jury upon the question raised, that is, the assumption of risk. But I submit this case to you upon the negligence of the defend-

ant company, in the first place, if any has been shown by the proof, and in the second place, the negligence of the deceased, if any has been shown."

That the learned trial judge declined to submit to the jury any aspect of the question of assumption of risk is shown by his refusal to give the following specially requested instruction and others set forth in the assignment of errors (*supra*, pp. 13 *et seq.*).

Instruction VII (p. 95): "If you find from the proof that the plaintiff's intestate was an experienced railroad man, that he was furnished with a book of rules of the company, that among such rules was rule No. 523, to-wit: 'Trains and engines must be run with caution when entering or moving through sidings or yard tracks, expecting to find them occupied.' And you further find that, after entering the yards and passing upon a siding or lead track, his engine in passing by another track, known as the scale track, struck cars standing on said scale track, and which were so close to the track upon which his engine was moving as that the engine could not pass said cars without striking it, and you further find that the deceased, D. C. Wright, was acquainted with the danger incident to passing cars in the condition that these cars were in; that he knew their situation and his attention had been directed to them, and that his death resulted from his engine being struck by the said cars, then I charge you that there can be no recovery in this case, because the said D. C. Wright assumed the said risks incident to the same, and your verdicts, if you

find as I have stated, should be for the defendant."

It thus appears that the issue of fact raised by the pleadings as to the assumption of risk was never decided by the trial judge or by the jury—that it was decided, for the first time, in the court of appeals.

Assumption of Risk Not Abolished by Federal Act.

The decision in the Horton case, followed by that in the Crockett case, so clearly indicates the view of this court that where the injury was not the result of a violation of any Safety Appliance Act the defense of assumption of risk remains just as it was at common law, that we assume no argument in support of that view is necessary.

S. A. L. Ry. Co. v. Horton, 232 U. S., 492.
Southern Ry. v. Crockett, 34 Sup. Ct. Rep., 897.

It may be stated, however, that the view announced in those two cases is in accord with the uniform ruling in all earlier cases passing upon the same question.

Central Vermont R. Co. v. Bethune, 206 Fed., 868.
Hall v. Vandalia R. Co., 169 Ill. App., 12.
Neal v. Idaho, etc., R. Co., 22 Idaho, 74.
Baker v. Kansas City, etc., R. Co., — Kas., —.
Freeman v. Powell (Tex.), 144 S. W. Rep., 1033.

Aside from this, the decision in the Horton and Crockett cases is supported by the view uniformly taken of the effect of similar English and state legislation.

Thomas v. Quartermaine, L. R., 18 Q. B. Div., 685.

B'gham Ry. Co. v. Allen, 99 Ala., 359.

L. & N. R. R. Co. v. Banks, 104 Ala., 508.

St. Louis, etc., R. Co. v. Ledford, 90 Ark., 543.

American R. M. Co. v. Hullinger, 161 Ind., 673.

Meller v. Mfg. Co., 150 Mass., 362.

Gleason v. New York, etc., R. Co., 159 Mass., 68.

Gombert v. McKay, 201 N. Y., 27.

Andrews v. Ry Co., 96 Wis., 348.

Defendant Company Not Guilty of Negligence.

The negligence of the defendant in this case was largely predicated on the rule of the company which read:

> "525. Cars on side tracks, whether in yards, or at station, must stand clear of all other tracks."
>
> Record p. 65 (70).

It will also be contended by opposing counsel that the issue of negligence was submitted to the jury under proper instructions, and that the verdict is conclusive.

It is our view that, as the facts are not in dispute, so far as this issue is concerned, the trial court should have determined, as a matter of law, that there was no negligence, because:

1. That rule, insofar as it required cars in yards to stand clear of all other tracks, was not designed as a rule of protection to employes or others, but solely for the expedition of the carrier's business and to prevent the delay which might frequently occur in yards if the rule were not observed.

Point is given to this by the fact that another rule—clearly a rule of protection to the employe—specifically required that engineers operating along yard tracks must move with caution "*expecting to find them occupied.*"

2. In view of the nature, character and purposes of tracks in railroad yards as distinguished from the tracks along the main line, there was no negligence in allowing a track in the yard to be either wholly or partially occupied.

Let us suppose that the coal car in question, instead of protruding a few inches over the lead track as it did in this instance, protruded the entire width of the track. That would seem to be a greater offense than a protrusion of a few inches. Yet, it would have been a situation which the Railroad Company had the right to create, because its yards

were largely for the purpose of storing cars and the company had promulgated rules for taking care of such a situation.

One can easily understand the necessity of keeping the main track clear of obstruction. Trains thereon move on schedules or on specific orders and the operatives have the right to expect a clear track and are not bound to anticipate obstruction. Their schedules require a high rate of speed. But yard tracks, as above mentioned, are not designed altogether or principally for transportation movements, but largely for the storing of cars, either temporarily or for some time. Switching movements are constantly going on there which necessitate cars being left for a few moments at one point or another and train operatives entering the yards have no right to expect to find the tracks unoccupied. To make the matter clearer, the Railroad Company in this instance had expressly promulgated a rule with which the deceased engineer was familiar, warning him that he must expect to find the tracks in the yards occupied and must handle his train accordingly.

In view of the foregoing, we respectfully say the mere fact of a coal car being allowed to protrude over the lead track was not negligence. As that was the only fact complained of as negligence, the charge

fails, and the trial Court should have peremptorily instructed the jury to find for the defendant.

Alleged Negligence of Fireman.

Some stress was laid by the plaintiff below on the proposition that the defendant was liable because the fireman was guilty of negligence. The only averment of the declaration suporting this theory was in the sixth count (p. 11):

> "The other servants, agents and employes were guilty of negligence in not giving said deceased an earlier warning so that he might have stopped the train sooner."

With respect to this, the learned Circuit Court of Appeals said:

> "Objection is made to a special request asked and given for plaintiff after the close of the general charge which submitted the question, whether the fireman was negligent in first assuring the deceased that all was right and in afterward failing to notify him of the danger in time to stop his engine, the court stating: 'I charge you if you find that the fireman was negligent in this respect and his negligence was the proximate cause of the injury, then you must find for the plaintiff.' It is urged that there was no allegation in the declaration and no evidence to warrant this charge, and, further, that the court failed to define 'proximate cause.' We think this falls fairly within the amended declaration; and while we are unable to see wherein the fireman failed in the discharge of his duty (unless possibly in delaying to reveal his

> doubts until too late) yet in the exception taken at the time not one of these objections was stated or called to the attention of the court. If it be admitted there was error in any of the respects now claimed, it was slight (it was not even noticed in the motion for a new trial) and is not perceived to have affected the verdict. We are not disposed under the circumstances to disturb the judgment on any such ground."
>
> Record p. 125 (139).

The learned Court of Appeals was wrong in saying no exception was taken to this part of the charge for the record shows that the charge of the Court on this subject was given after the conclusion of the general charge, whereupon counsel for defendant (Mr. Biggs) said:

> "And I except to your giving the charge there as requested by the plaintiff that you just read."
>
> Record, p. 85 (93).

We do not understand the rule to be that in order to take advantage of the error of the trial court in giving a special instruction requested by the plaintiff, the defendant must state his reasons or grounds for exceptions, unless asked to do so by the Court.

The action of the lower court in giving this charge was specifically assigned as error in the Circuit Court of Appeals (p. 113).

In any event there was no evidence whatever justifying such a charge. The only witnesses who

were present at the accident and testified as eye witnesses were the fireman and the brakeman.

The fireman testified that when about five car lengths from the offending car the engineer asked him if the track was clear to which he replied "alright," and a moment later while he (the fireman) was putting in coal the engineer—evidently understanding that there was a doubt about it—repeated his inquiry and the fireman, as soon as he closed his fire door, looked again and was unable for a second or two to determine whether the engine would pass. "I hollered then that they wouldn't clear and I said 'get off,' and I jumped off the engine."

The colored brakeman told the engineer before the latter's last inquiry of the fireman, that "it didn't look like them cars was in the clear," whereupon the engineer asked the fireman if they were in the clear, as above indicated.

Opinion of C. C. A., p. 123.
See also Testimony of S. Johnson, p. 74.

From all of this it is clear that the fireman was guilty of no negligence. *The Circuit Court of Appeals was "unable to see wherein the fireman failed in the discharge of his duty"* (p. 123). The offending car protruded only a very few inches over the track, and whether the engine could pass or not was a matter of judgment, and the engineer well understood this.

We, therefore, respectfully ask that the judgment of the trial Court and the Court of Appeals be reversed and the cause remanded for a new trial, for that:

1. There was no negligence on the part of the defendant in allowing one car to project over a track *in its yards*, particularly in view of the rule promulgated by it that engine-men must expect to find tracks in the yards occupied.

2. Assuming that there was negligence on the part of the defendant, the situation was one perfectly obvious to the engineer and he assumed the risk.

3. After the situation due to the alleged negligence of the defendant had come about, the deceased engineer became aware of it in ample time and the right of his administratrix to recover is barred by the doctrine of last clear chance.

4. Under the doctrine of the Slocum case, the Court of Appeals was in error in attempting to decide the question of fact as to whether the decedent assumed the risk, that question not having been determined by the Trial Court.

Respectfully submitted.

H. D. MINOR,
CHARLES N. BURCH,
For Plaintiff in Error.

IN THE

Supreme Court of United States

OCTOBER TERM, 1914.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
Plaintiff in Error,

vs.

ADA R. WRIGHT, ADMINISTRATRIX OF D. C. WRIGHT, DECEASED,
Defendant in Error.

No. 218

MOTION OF DEFENDANT IN ERROR TO AFFIRM, NOTICE AND BRIEF IN SUPPORT OF SAID MOTION.

McKINNEY BARTON,
Attorney for Defendant in Error.

SUBJECT INDEX.

IN THE

Supreme Court of United States

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ADA R. WRIGHT, ADMINISTRATRIX OF D. C. WRIGHT, DECEASED,
Defendant in Error.

No. 218

MOTION OF DEFENDANT IN ERROR TO AFFIRM.

Now comes Ada R. Wright, administratrix of D. C. Wright, deceased, the defendant in error, by McKinney Barton, her attorney, and moves this court to affirm the judgment of the Circuit Court of Appeals, Sixth Circuit, on the grounds that it is manifest that the writ of error herein was taken out for the purpose

of delay only, and that the questions on which the decision of the cause depends are so frivolous as not to need further argument.

McKINNEY BARTON,
Attorney for Defendant in Error.

"Messrs. Chas. M. Burch,
H. D. Minor and
Thomas A. Evans,
Attorneys for Plaintiff in Error,
Memphis, Tennessee.

Sirs:—

Please take notice that on all the papers and proceedings herein, I shall submit to the Supreme Court of the United States at a stated term thereof on Monday, October .., 1914, at the Capitol, in the City of Washington, District of Columbia, at the opening of the court on that day or as soon thereafter as I may be heard, the motion to affirm, of which the foregoing is a copy; and that I shall submit with said motion, in support of the same, the brief or argument annexed.

Memphis, Tennessee, September .., 1914.
McKINNEY BARTON,
Attorney for Defendant in Error.
Exchange Building, Memphis, Tennessee."

Copy of above motion together with a copy of motion of defendant in error, Ada R. Wright, administratrix of D. C. Wright, deceased, to affirm the judgment in above styled cause and a copy of the printed brief in support thereof, received by me, this .... day of October, 1914.

.....
Attorney for Plaintiff in Error, Yazoo & Mississippi Valley Railroad Company.

IN THE

Supreme Court of United States

OCTOBER TERM, 1914.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
Plaintiff in Error,

vs.

ADA R. WRIGHT, ADMINISTRATRIX OF D. C. WRIGHT, DECEASED,
Defendant in Error.

No. 218

BRIEF FOR DEFENDANT IN ERROR IN SUPPORT OF MOTION TO AFFIRM.

The defendant in error intestate, D. C. Wright, suffered an injury on the 9th day of May, 1911, which resulted in his death on the same date (Tr. p. 29).

A verdict and judgment were rendered in favor of the administratrix, against the plaintiff in error, the Yazoo & Mississippi Valley Railroad Company, on the 27th day of January, 1912 (Tr. p. 16).

The Circuit Court of Appeals, Sixth Circuit, affirmed the judgment (Tr. p. 121).

This case is now before this court on motion of defendant in error to affirm the judgment of the Circuit Court of Appeals, on the grounds that the writ of error was sued out for the purpose of delay and that the questions on which the decision depends are so frivolous as not to need further argument (Rule 6, paragraph 5).

Mo. Pac. R. Co. vs. Castle, 224 U. S. 541, 544.

This action was instituted under the Employer's Liability Act of April 22, 1908, as amended by the Act of April 5, 1910 (Tr. p. 5).

It is conceded that the defendant in error, intestate, was injured upon an interstate train while employed in interstate commerce (Tr. pp. 21-25).

STATEMENT OF CASE.

On and prior to May 9, 1912, the defendant in error, intestate, D. C. Wright, was employed by plaintiff in error, the Yazoo & Mississippi Valley Railroad Company, in the capacity of locomotive enginer on a freight train running from Memphis, Tennessee, to Gwin, Mississippi. On that date, about three o'clock, he was fatally injured, from which injuries he died that night.

The deceased received his injuries while entering the railroad yards at Gwin, Mississippi, when his engine collided with a coal car, protruding so far over the sidetrack on which it was standing, as not to allow clearance for the engine that was passing along a lead track.

The defenses were not guilty, contributory negligence, and assumption of risks.

One of the rules of the company provides that:

"Cars on sidetracks, whether at yards or stations, must stand clear of all other tracks."

This rule was admittedly violated.

The facts fairly stated in the opinion of the Circuit Court of Appeals are as follows:

"The train in question left the main track some 1,600 feet north of the point of collision and was moved southwardly along the main lead track of the yards until it reached a point something like 200 feet north of the coal car, when, it is claimed, the engineer had the coal car in full view and could determine whether his engine could or would not clear it. The evidence tends to show that the engineer had his train under control. Indeed, the steam was shut off and the train slowed up at or near the point last mentioned.

The coal car was standing on the scale track which intersected the main lead track on its south side, that is on the south side, opposite to that occupied by the engineer; the car lacked but little (the fireman testified four to ten inches) of clearing the space required for the engine to pass. As the engine approached, the coal car, it is reasonably plain from the evidence, that the engineer's view of the car gradually diminished until it was cut off by the engine, but that the fireman's view was not obstructed. It was one of the fireman's duties, under the rules, to 'keep a careful watch upon the track and instantly warn the engineman of any obstructions,' and the fireman here appears to have performed this duty to the best of his ability. He testified that the engineer asked him:

'How everything was around there, if it was in the clear and I looked out to see if it was, and I said: "All right," and he opened the engine up and went a short ways, and shut off again, and he asked me if some cars was clear over there, and I couldn't tell whether they were clear or not, and we got right on them before I thought they wouldn't clear—lacked only four to eight or ten inches of clearing.'"

The witness seeming to hesitate, the court directed him to proceed, when he said, evidently in answer to the second inquiry of the engineer:

"When he asked me if they would clear, I couldn't tell whether they would or not. I thought all the time they would and was still looking at them all the time. I hollered then, that they wouldn't clear and I said: 'Get off,' and I jumped off of the engine and the next I saw of him, he was caught between the tank and engine—and the cab. The corner of the car slashed the cab on my side."

The head brakeman testified that he was standing in the gangway of the engine, but the fireman testified that this brakeman was not on the engine at all. However, the brakeman stated that he told the engineer, that

"It didn't look like them cars were in the clear, the engineer then asked the fireman 'was they clear,' and the fireman was putting in the fire at the time, and when he got through, he looks ahead, and he told him they wouldn't clear, and he didn't understand the fireman and he asked me what he said, and I said: 'He said they wouldn't clear,' and the fireman had done jumped off and he leaves his side to go to the fireman's side, to see if they would clear, and I jumped off after he left his side" (Tr. of Rec. pp. 121 to 127).

ASSIGNMENTS OF ERROR.

Assignment of errors filed by plaintiff in error, embraces sixteen alleged legal errors (Tr. pp. 128-133).

The first, second and third assignments are too general to be considered (Tr. pp. 128).

> *Van Stone vs. Stillwell & Bircce Mfg. Co.*, 142 U. S. 128-132;
> *Stevens vs. Gladding*, 13 Howard 64.

All of the remaining errors assigned refer to the assignment of error in the Circuit Court of Appeals.

All of the assignments of error, except the first three, which are merely general and formal, are based in one way or another on the doctrine of assumption of risks, and our main proposition on this motion is that that question does not and cannot arise in this case.

There are absolutely no facts, calling for the application of this doctrine, whatever construction may be placed on the Federal Employes Liability Act, by this court.

In the district court and in the Circuit Court of

Appeals, counsel for the Railroad Company based their contention on two theories, advanced by them.

One theory was based on their contention as to the usual condition of the yards, where the accident happened, which they contended was known to the deceased engineer.

The other theory was based on the occurrences immediately at the time of the accident.

As to the first, the usual condition of the yards, we say there is absolutely no evidence in the record, that the condition or fact, which caused the accident, was or had been habitual, or usual, or that the existence of such condition was known to the deceased or that he continued work, knowing of such conditions.

The thing that caused the accident was that a car on the track adjoining, the one on which this train was proceeding, was not in the clear, though so near that it appeared to be, being about four to ten inches over, just enough to cause the accident, an exceedingly dangerous situation. There is no evidence that such condition was habitual or usual at this place or at any other place for that matter, nor even that it had ever occurred before. Nor was there any evidence that the deceased engineer ever knew of the existence of such things, if they had occurred. We take it that the verdict of the jury, the action of the district judge and the findings of the United States Circuit Court of Appeals, is conclusive on this question, and that this court

need not investigate the record for the evidence on this point, to ascertain how the facts are.

In the opinion of the court below, on this subject, it is said (see Rec. p. 123):

"We are convinced that *there is no* evidence, really *tending* to show that the deceased assumed the risk of the danger that lurked in the protruding coal car. The essential quality of consent on his part is lacking. The vital question is whether he knew or was chargeable with knowledge of the danger and voluntarily exposed himself to it."

Again, on page 124:

"It is further insisted that the evidence in substance shows that the tracks in the railroad yards in question were generally and necessarily more or less filled with cars, and that this was a condition with which the deceased was familar and was accompanied by dangers which entered into the risks of his employment. This may well be conceded, but it does not affect the present case. The three coal cars in question, the foremost of which protruded as stated, were not on the main lead track, along which the deceased was operating his engine and train. We have seen that one of the rules of the company forbade the placing of a car as this coal car was situated; and the evidence *does not tend to show* that the company was in the habit of violating this rule, much less that the deceased was bound to anticipate such violation. This rule entered into the contract of employment of the deceased, and even occasional disobedience of the rule would neither put the employe upon notice nor excuse the company."

We assume that this is conclusive of this court, as there can be no reversal for any error of facts.

Foster's Fed. Practice, vol. 3, sec. 496, p. 1969 and note;
30 U. S. Rs., sec. 1011;
Dower vs. Richards, 151 U. S. 658;
Elliott vs. Toeppner, 187 U. S. 327;
Behm vs. Campbell, 205 U. S. 403.

But if this court shall, itself, look to the evidence, it is bound to come to the same conclusion, because, as we say, there is no evidence that it was usual for cars to be left in this yard or any other yard so they would not clear. On the contrary, the positive rule of the company was that cars must not be so left.

The opinion of the lower court (Rec. p. 124, also Rec. p. 66).

It is true that there was also a rule to require engineers to proceed cautiously, in yards, expecting to find tracks occupied, wholly or partially, but no rule warning them that cars might not be left in the clear.

There was also evidence in the record that *tracks* in yards ere occupied *wholly and partially* by a large number of cars, in yards at different places, and that cars are left indiscriminately in yard limits (Tr. p. 68, the testimony of Mr. John M. Walsh).

Mr. T. L. Dubbs, witness for the defendant company (Rec. p. 62), also testified that cars will be stand-

ing on any track in the yard, liable to find them there at any time.

Mr. Thomas F. Love, also witness for the defendant, also testified (Rec. p. 71), that different tracks were frequently occupied or obstructed wholly or in part by cars. When asked as to the condition of the yard, on the day of the accident, he said: "That it was pretty full" (Rec. p. 70).

The testimony of these witnesses is the only evidence in the record as to the condition of this yard and nowhere will the court find a word or a line indicating that in violation of the company's positive rule, that cars were left in the condition this car was, so as to produce such accident, nor is there a line of proof indicating that this engineer knew of previous violations of this rule, or of the condition existing at this time, or that he continued to work, knowing and accepting such conditions.

As to the other theory that he had warning of the condition and still, knowing the danger, proceeded. This was not and could not be a ground, involving the doctrine of assumption of risks, but on the contrary, it necessarily was a question of contributory negligence, but on this subject the record is equally clear as to the facts, as found by the lower court.

On this theory as well as the theory based on the general condition of the yard, the lower court, also found the facts, against the contention of the Rail-

road and said, as we have shown, *"that there was no evidence really tending to show"* that the deceased assumed the risk of the danger that lurked in the protruding coal car, that the essential quality of consent on his part was lacking, but the vital question is whether he knew or was chargeable with the danger, and voluntarily exposed himself to it. The fact that the means prescribed for finding out the danger was adopted and failed to reveal it in time to avoid it, negatives the whole idea of conscious assumption, and says, the lower court:

"This must not be confused with acts of negligence."

Citing a number of cases, to be found on page 124 of the record, among others the case of *Schlemmer vs. Buffalo, Rochester, etc., Ry. Co.*, 205 U. S. 1, 12, as well as a number of other cases.

Continuing, it is said, in the opinion of the lower court:

"These decisions afford apt illustrations of the varying conditions under which the principle of assumption of risk is or is not applicable. We do not mean to hold that where the pertinent evidence of a given case is conflicting, as respects the employe's knowledge and appreciation of the danger, and his consent, to expose himself to it, the question can be determined as a matter of law, as distinguished from its submission to the jury.

What we hold is that the evidence here is *not con-*

flicting touching the essential element of assumption of risk, and consequently, that it was not prejudicial error, to refuse to submit the matter to the jury, no matter whether the obstructions in the instant case would, under other state of facts, be open or not, to the defense of assumption of risk.

The district judge, in this case, properly left to the jury the question as to the contributory negligence of the deceased engineer, in proceeding under the circumstances disclosed."

The jury passed on that question; its verdict was approved by the district judge and by the court of appeals, and we take it that that is conclusive. However, we call the court's attention to the further finding, by the court of appeals, of the facts, and the recital of the testimony of the witnesses, and the statement by the court of appeals, that "it was strenuously urged, that the engineer saw the danger, and assumed the risk of passing," and the court says:

"As it seems to us, this overlooks the obvious force and effect of the evidence. The engineer seems to have been solicitous as to danger, and he sought and employed the fireman, the company's designated agent, to assist him in determining whether or not there was danger. He was assured that there was none, until it was too late to avoid it."

In another place, the court of appeals said:

"Referring to the testimony as to the occurrences immediately at the time of the accident, now, however, this testimony may be viewed, and these were the only

witnesses who appear to have seen the accident, one important feature of it stands out clearly. It is that the engineer and fireman, were alert and that the clearance seemed to these experienced men, sufficient. And this is not contradicted by the brakeman, until at or about the time the fireman jumped."

As shown by the opinion of the court of appeals, the evidence clearly shows that the engineer was solicitous and was assured that the train would clear, and had no warning, he himself being in a position where he could not see until it was too late, to avoid the accident, and therefore, obviously, he did not know, and could not have known of the danger, in such a way, that it can be said that he knew and assumed the risk.

The distinction is too well known, and too familiar to this court, to require the citation of authorities, on the line of demarcation between an error of judgment, involving maybe contributory negligence and the doctrine of the assumption of risks, but we may cite the following:

In the case of *St. Louis Cordage Co. vs. Miller*, 126 Fed. Rep. 495, 61 C. C. A., a case bearing the stamp of approval of the plaintiff in error, the court says:

"Assumption of risk is a voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment and to relieve his master therefrom. Contributory negligence is the occasional action or omission of the servants without ordinary care of its consequences."

In the case of *Narramore vs. C. C. C. & St. L. R. R.*, 96 Fed. Rep. 298, it is said:

"Assumption of risk is in such cases an acquiescence of an ordinarily prudent man *in a known danger, the risk of which he assumes by contract.* Contributory negligence in such case is that action or known action in disregard of personal safety by one who treated the known *danger as a condition and acts with respect to it without due care of its* consequence."

Does not this definition of contributory negligence fit in exactly with plaintiff in error's contention of the deceased's course of action?

If it were undisputed that the deceased saw the danger of the overhanging coal cars, but took the chance of getting by in safety, would it not then be said that the deceased treated the known danger—*i. e.*, the obstruction as a condition, *i. e.*, he saw it—but that he acted with respect to it without due care of its consequences—*i. e.*, proceeded to try to get past—or was the deceased employed by the defendant company, the plaintiff in error, to run its cars past coal cars on adjoining tracks, which were not in a position to clear the track on which he was proceeding? To state the question is to give its answer.

Again, in the Narramore case, *supra*:

"Assumption of risk and contributory negligence approximate when the danger is so obvious and imminent that no ordinarily prudent man would assume the

risk of injury therefor, but when the danger though present and appreciated is one which many men are in the habit of assuming and which prudent men who must earn a living are willing to assume, for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence, if, though, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care and who by reason thereof suffers injury is guilty of contributory negligence, because he and not the master, caused the injury or because they jointly caused it."

As said in the case of *Schlemmer vs. Railway*, 205 U. S. 1:

"*The preliminary conduct* of getting into dangerous employment or relation is said to be accompanied by the assumption of the risk. *The act more immediately leading to the specific* accident is *called* negligent, but the difference between the two is one of degree, rather than of kind; and when a statute exonerates a servant from the former act, at the same time it leaves the defense of contributory negligence still open to the master; * * * then unless *great care be taken* the servant's rights will be sacrificed by simply charging him with assumption of risk under another name."

So we respectfully submit to the court that under the rules of law, it is not possible to invoke the doctrine of assumption of risk, as applicable to the facts developed and occurring immediately at the time of the accident and the only question that could arise, upon these facts, and the evidence in the record, relating to that, is and was the question of contributory negligence,

which was submitted to the jury, and as to which there was no exception in the court below, and no assignment of errors, here, and the question of contributory negligence is of course, precluded by the verdict and judgment and also by the finding of the United States Circuit Court of Appeals. But, if it were possible to predicate a defense of assumption of risks, on the facts occurring and developing immediately at the time of the accident, then the facts show beyond question, and there is no evidence tending to the contrary, that the deceased engineer was trying to ascertain whether there was danger or not, and did not know of the danger, and therefore, could not have assumed the risk, so, we respectfully insist that there was not and is not anything in this record calling for the application of the doctrine of assumption of risks, and it would have been error in the district judge to have submitted that question to the jury. On this condition of the record we do not deem it necessary or even proper to discuss the question as to the proper construction of the Act of Congress, on the question of assumption of risk. We think it only proper to say in this connection that if the insistence of learned counsel, for the defendant Railroad Company, could be maintained, it would be virtually a judicial repeal of the main provisions of the Act of Congress.

As we understand the assignments of error, they are all practically based on this question of assumption of risk.

The evidence was clear as to the negligence of the defendant company and its agents, in leaving the car so, that it would not clear and there was also evidence on which the jury could infer negligence on the part of the foreman. Of course, the verdict of the jury is conclusive on these questions, and therefore the assignment of error, that the district court should have sustained the motions for peremptory instructions, is without any basis and requires no further argument.

All other errors assigned before the Circuit Court of Appeals, are based either on these contentions, or were not presented by the record, as shown by the opinion of the court of appeals. We therefore respectfully submit, that not only does the record fail to disclose any plain error, committed by the court of appeals, in any of the particulars complained of.

Chicago Junction Railroad Company vs. King, 222 U. S. 222.

But it is entirely clear that there is no basis whatever upon which to base an argument, in favor of the insistence of the counsel for the Railroad or which requires any extended consideration by this court, and we also respectfully insist that this is a typical case for the application of rule 23, as with all due deference to learned counsel, it must be apparent that the writ of error was prosecuted only for delay and is frivolous and it is also a typical case for the application of that

part of rule 23, which awards damages in addition to the interest for the prosecution of such a writ and for the delay. The court will see that a clear case of liability is presented.

But, if the question of the construction of the Act of Congress as to assumption of risk is not properly presented by the record, as it clearly is not, then this court will not go into the other questions as to the negligence of the appellant, the defendant Railroad Company, contributory negligence, etc., which were passed on by the district court and the United States Court of Appeals, as:

"This court is not under the conditions stated, called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible by a minute analysis of the evidence, to draw therefrom, inferences which may possibly conflict with the court below as to the tendencies of the proof. But, will give the record only such examination and consideration as may be necessary to enable it to determine whether plain error was committed by the court."

Chicago Junction R. R. Co. vs. King, 222 U. S. 222-224.

In other words, the question of the assumption of risk being out of the way, the decision of the United States Circuit Court of Appeals, Sixth Circuit, is conclusive.

The engineer, for whose death this suit was brought, was killed on the 8th day of May, 1911. Suit

was instituted in the district court at Memphis on the 6th day of November, 1911, and a full and fair trial was had. Judgment was rendered in favor of the plaintiff on the 4th of March, 1912. The case was then taken to the United States Circuit Court of Appeals, where a full hearing was had and the judgment below affirmed on May 6, 1913.

This writ of error was then prosecuted, and the defendant took advantage of all the delay allowed and failed to have the record printed until a few weeks ago.

Plaintiff, the poor widow, was unable to have it done, and this case, more than four years after the death of plaintiff's husband, is still pending. A typical and painful case of the law's delay, and we therefore respectfully urge that the penalty provided by the rules be enforced.

Respectfully submitted,

McKinney Barton,
Attorney for Defendant in Error.

SUBJECT TO INDEX.

IN THE

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No. 218

ADDITIONAL BRIEF ON MOTION.

McKINNEY BARTON,
Attorney for Defendant in Error.

LIST OF CASES.

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Cordage Co. vs. Mill, 45, 126 Fed. Rep. 495.
Narramore vs. Railroad, 96 Fed. Rep. 298.
Schlemmer vs. Railroad, 205 U. S. 1.
Slocum vs. New York Life Ins. Co., 228 U. S. 387.
White vs. Brumley, 20 How. 225.
Hamilton vs. Russell, 1 Crauch 309.
Clark vs. Konslen, 10 Pet 657.
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Thompson vs. King, 111 U. S. 549.
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SUBJECT INDEX.

IN THE

Supreme Court of United States

OCTOBER TERM, 1914.

YAZOO & MISSISSIPPI VALLEY R. R. CO.,
Plaintiff in Error,

vs.

ADA R. WRIGHT, ADMINISTRATRIX OF D. C. WRIGHT, DECEASED,
Defendant in Error.

ADDITIONAL BRIEF ON MOTION.

In this case, counsel for plaintiff in error have not seen proper as we conceive it to endeavor to show this court that we were in error in the brief filed by us in support of the motion to affirm as to our position that the questions they have sought to raise and discuss do not arise in this court, on the record presented, and have largely ignored our brief on the motion and

have insisted on filing an elaborate brief and argument on all the questions that they have at any time suggested or discussed, in the entire course of the case, many of which are academic so far as this particular case is concerned. They insist on filing an elaborate brief on the very questions, which we say are not before your Honors. It may be, astute counsel assume that we will wildly rush at the red rag thus shaken in our faces, and thereby satisfy the court that for the purposes of this motion, these questions are here for discussion and decision. But, whatever may be our own tempermental defects and liability to panic, we feel sure this Great Tribunal will not be disturbed or deflected in its judgment or led to consider or even to listen to discussion of questions not properly presented by the record, and we therefore respectfully insist on confining the discussion to the questions presented by the motion, only desiring to add if the court by any possibility, which we cannot conceive, exists, should differ with us as to the merits of our motion, we would then ask leave to file a more extensive brief and argument on the questions discussed by counsel for plaintiff in error in their general brief, and argument.

For reasons stated in the brief heretofore filed, we still respectfully insist and submit, that the only question that could be properly raised or discussed in this court is that based on the doctrine of assumption of risk, but we note that on pages 67 and 68 of the

general brief and argument of counsel, filed in this case, an error is predicated on the charge of the district judge of a special request of counsel as to the alleged negligence of the fireman in failing to warn the engineer of the danger of the protruding coal car. We submit, that the opinion of the United States Court of Appeals, on this matter is conclusive (see Record p. 125 (139).

Second. But, in any event as properly said by the court of appeals, this question was not raised on the motion for a new trial (see Record pp. 93 to 108), and,

Third. The special request was correct in any event and properly given. The objection now made to it is that there was no evidence justifying the charge. The question submitted to the jury, under this request, was whether the fireman who was in a position to see, was negligent in not earlier notifying the engineer of the danger.

The facts were in evidence that he was in a position to see while the engineer was not, that the engineer called on him for information and the fireman failed to give correct information, in time to avoid the accident. The court of appeals was itself of the opinion that the fireman was alert and simply made a mistake of judgment; but, there were facts from which a jury might draw an inference one way or another, and it was proper to submit the question.

Plaintiff in error takes contradictory positions.

First, that there was no evidence of negligence by the fireman, though he was on the side where he could see the obstructing cars and the engineer could not, and,

Second, that the obstructing cars were *a danger clearly and obviously apparent to the engineer, who could not see and that he therefore assumed the risk of going ahead.*

We think that the fireman was deceived and first believed the cars would clear but it was a question for the jury to say whether enough appeared to put anyone who could see on notice of the danger and if there was, then he was guilty of negligence in not informing the engineer who called on him for information. If there was not, then it could not affect the verdict and certainly then there could be no ground for the application of the doctrine of assumption of risk, *based on the knowledge of a known and obvious danger.* So, we say, then that the case *comes back solely to the question of assumed risk*, on the two theories of counsel, based, first on the usual conditions of the yard, supposed to be known to the deceased, and second on the conditions appearing at the time of the accident. As to the second proposition we might elaborate but do not believe we can make our position *more* clear as to the distinction between contributory negligence and assumption of risk, than we have in the brief heretofore filed.

This court has itself made the distinction so clear that further discussion is useless.

See authorities heretofore cited.

The rule as stated in *Choctaw R. R. Co. vs. McDade*, 191 U. S. 64, and *Texas & Pacific R. R. Co. vs. Archibold*, 170 U. S., is that "the true test as to assumption of risk is not as to whether the employe *by exercise of due diligence* could have discovered the danger but whether *the defect or danger was known or plainly observable.*"

No stronger argument could be made by us than that the facts on the second theory of counsel as to the danger appearing at the time of the accident, do not justify the application of the doctrine of assumption of risk, than the statement made by them that there is no evidence whatever of negligence on the part of the fireman. If there was no seen or observable danger on the side of the fireman, who did not warn the engineer in time, how could the engineer who could not see have known and observed the risk. We confess, we cannot get counsel's viewpoint. But, counsel have referred to testimony of negro brakeman, to show Wright had actual knowledge, and saw and realized the situation at the particular time of the accident.

We say without fear of contradiction from the record, that there is no proof in the record which would show or tend to show that the deceased saw

the danger of the overhanging coal cars, but that he took a chance of getting by. The evidence of the defendant in error showed conclusively that not only he did not see the danger, and that he was not in a position to see the danger, being on the opposite side, but that out of an abundance of caution had inquired whether or not there was danger. He had seen cars scattered throughout the yards, and had a general knowledge of their general position in the yards; he knew no doubt that there were cars on this scale track, but that is a different statement from the statement that he knew its exact position, saw that they would not clear, but attempted to get by anyway, and even defendant's alleged eyewitness to the accident testified that:

"Q. Then what was said and what was done? A. I spoke and told him of it, and he asked the fireman was they clear, and the fireman was putting in the fire at that time, and when he got through he looks ahead, and he told him they wouldn't clear, and *he didn't understand the fireman and he* asked me what he said, and I said he said they wouldn't clear, and the fireman had done jumped off and he leaves his side to go to the fireman's side to see if they would clear, and I jumped off after he left his side" (Record p. 80).

The court will note that the facts testified to by this witness are:

First. That the fireman was putting in the fire when the engineer asked him if the cars were clear.

Second. That the fireman did not reply until he got through.

Third. That the fireman then looked ahead and told him, the engineer, that they would not clear.

Fourth. That *the engineer did not understand what the fireman* said.

Fifth. *That he asked him, the brakeman, what he had said.*

Sixth. *That he told him that the fireman said they would not* clear.

Seventh. *That at this time when he told him,* then "*the fireman* had done jumped off."

That is to say instantly on the fireman's reply, he had jumped off, and that then the engineer left his side, the right side of the engine, to go to the fireman's side.

Now, these are the facts to which he testifies. This witness says *that he went there to see if they* would clear, and therefore counsel for defendant assume that he had notice that they would not clear, and was still letting the engine go on, and went on to see if they would clear. He says he jumped off after the engineer left his side.

Now, this statement of the brakeman that the engineer went over to see if they would clear is obviously simply a conclusion of the witness and not a statement of fact.

Assuming that this evidence is worthy of belief, and the jury did not believe it, when analyzed, it can only show that the engineer was *taking the usual precautions and trying to run no risks and to get accurate knowledge of the condition, and this evidence itself wholly contradicts the assumption and theory of the defendant's counsel that Wright, the engineer, did actually know of* the danger.

Giving this testimony credence and allowing every inference that can be drawn from it in defendant's favor, it can only show contributory negligence, and certainly does not and cannot show that the engineer knew how the cars were located, and the *witness says he went over to see how they were located.*

The evidence *conclusively shows that the instant* the fireman *notified the engineer and* himself started to get out of the engine, the *engineer shut off the steam and applied* the *emergency* brake, so *that instead of knowing the condition and assuming the risks, as soon as he knew of the condition,* the evidence shows that he acted, and *the very utmost that can be drawn from any evidence introduced is that he was guilty of some contributory negligence in not finding out the real danger sooner.*

All of the proof showed that the collision occurred just an instant before the fireman jumped and an instant before the brakeman, Johnson, jumped (and here it might be said that it is conclusively shown that Johnson, the brakeman, was not on the engine at all), and therefore, according to the statement of this defendant's own eyewitness, he was not told that the cars would not clear until it was too late, because he says that the deceased did not understand the fireman and asked me *what he said, and "the fireman had done jumped off."*

But assuming that there is some evidence in the record showing or tending to show that the deceased "saw the overhanging coal cars, but took the chance of getting by," if there is any evidence in the record tending to show this, although disputed by other evidence, of course plaintiff in error was entitled to a correct charge of the law in respect thereto. We may say that the defendant was given every advantage of the correct charge in respect to this phase of the case, in that his Honor charged the jury fully as to contributory negligence, and there is no exception or no point made in this brief as to any error in this respect.

ASSUMPTION OF RISK OR CONTRIBUTORY NEGLIGENCE.

Agreeing again that there is a well-understood difference between the doctrine of assumed risk and contributory negligence, we ask which rule is applicable to these facts?

In the case of *St. Louis Cordage Co. vs. Miller*, 126 Fed. Rep. 495, 61 C. C. A., a case bearing the stamp of approval of the plaintiff in error, the court says:

"Assumption of *risk is a voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment*, and to relieve his master thereof. Contributory negligence is the occasional action or omission of the servants without ordinary care of its consequences."

In the case of *Narramore vs. C. C. C. & St. L. R. R.*, 96 Fed. Rep. 298, it is said:

"Assumption of risk is in such cases an acquiescence of an ordinarily prudent man *in a known danger*, the risk *of which he assumes by contract*. Contributory negligence in such case is that action or known action in disregard of personal safety by one who treated the known *danger as a condition and acts with respect to it without due care of its* consequence."

Does not this definition of contributory negligence fit in exactly with plaintiff in error's contention of the deceased's course of action?

If it were undisputed that the deceased saw the danger of the overhanging coal cars, but took the chance of getting by in safety, would it not then be said that the deceased treated the known danger, *i. e.*, the obstruction as a condition, *i. e.*, he saw it—but that he acted with respect to it without due care of its consequences—*i. e.*, proceeded to try to get past—or was the deceased employed by the defendant company, the plaintiff in error, to run its cars past coal cars on adjoining tracks which were not in a position to clear the track on which he was proceeding? To state the question is to give its answer.

Again, in the Narramore case, *supra*:

"Assumption of risk and contributory negligence approximate *when the danger is so obvious* and imminent that no ordinarily prudent man would assume the risk of injury therefor, but when the danger though present and appreciated is one which many men are in the habit of assuming and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, though having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care and who by reason thereof suffers injury is guilty of contributory negligence because he and not the master caused the injury or because they jointly caused it."

As said in the case of *Schlemmer vs. Railway*, 205 U. S. 1:

"The *preliminary conduct* of getting into dangerous employment or relation is said to be accompanied by the assumption of the risk. The *act more immediately leading to* the *specific* accident is *called* negligent, but the difference between the two is one of degree rather than of kind, and when a statute exonerates a servant from the former act, at the same time it leaves the defense of contributory negligence still open to the master; * * * then unless *great care be taken*, the servant's rights will be sacrificed by simply charging him with assumption of risk, under another name."

As to the first theory based on the known condition of the yards, we again say the thing that produced this accident was a car left on a side or switch track that would not and did not clear and there is *not a line or word of evidence that this was usual*, known, or *had ever occurred before and there was a positive, absolute rule of the company that this should* not be allowed and should not occur. Evidence that these "various tracks in the yard were and might be expected to be *wholly or partly occupied by cars*" *is* no *evidence* that cars occupying one track were usually and might be expected to protrude over another so as not to clear especially in the face of a rule of the company that this should not occur, and there is no other evidence in the record.

Believing it unnecessary and that this court will not in this case desire or listen with patience to a discussion of the question as to the extent and limitation of the doctrine of assumption of risk, under the federal statute, which question we say does not arise under this record we do not attempt to give our views on that nor to discuss the numerous cases cited by counsel but as stated, if this court should by any possibility think otherwise, we would ask leave to file an argument on this subject.

While not deemed necessary, from a sense of responsibility, and a spirit of extra precaution we beg to note only three other points raised in counsel's general brief and argument.

First. The reference to the doctrine of the last clear chance.

There was no such point raised in the district court, in the United States Circuit Court of Appeals, nor in the assignment of errors, nor indeed can any such point arise on the facts of this case. If defendant below was guilty of negligence in any of the respects alleged and passed on by the trial court, the engineer's conduct could only be looked to and passed on as contributory negligence and this was done by the jury under a proper charge and also by the court.

Second. As to the rule of the Slocum case invoked.

We confess an obtuseness which precludes us from any clear comprehension of adverse counsel's insistence that this case should be reversed, because it is said that the rule established by this court in case of *Slocum vs. New York Life Ins. Co.*, 228 U. S. 387, was violated, in that it is claimed the United States Court of Appeals erred in undertaking for the first time to decide the question of fact that the facts did not sustain the defense of assumption of risks and that the district judge did not decide it himself nor allow the jury to decide it. But, for reply so far as we do understand it, we say:

First. The point was not raised in the motion for a new trial (Record pp. 93-100).

Second. This point was not raised in the assignments of error in the United States Circuit Court of Appeals (Record, pp. 105 to 114).

Third. The point is not raised by the assignments of error filed in this court (Record, pp. 128, 133).

Fourth. The district judge did pass on and decide the question by

A. Refusing the several requests of defendant to charge the doctrine of assumption of risk (Record, pp. 84 to 92).

B. In his general charge (Record, p. 82).

C. In overruling the motion for a new trial (Record, pp. 100-102).

The district judge gave as one of his reasons for overruling the motion for a new trial that the law of the assumption of risk would not be applicable under the evidence.

The holding in the Slocum case was simply that where the trial court had refused to direct a verdict for defendant and had rendered a judgment in favor of plaintiff on the jury's verdict and where acting under a statute of Pennsylvania, the United States Circuit Court of Appeals had reversed the trial court and rendered a judgment on defendant's motion therefor made in the court below, *non obstante veredicto*—that this was error and a violation of the seventh amendment and that the court of appeals should have reversed and remanded the case for a new trial.

Now, as we understand it is sought to apply this rule to a case where the verdict of the jury was approved in the court below and judgment rendered thereon which was affirmed by the United States Circuit Court of Appeals, simply because the district judge refused to charge the rule of assumption of risk, holding the evidence did not justify its application or there was no evidence calling for it, which holding the court of appeals affirmed.

The point does not arise on this record but if it did it was not error to refuse to charge on principles of law not applicable under the evidence and it is

error to charge on such principles when there is no evidence rendering them applicable.

We cite counsel for plaintiff in error, pp. 68 and 69 of general brief filed.

White vs. Brunley, 20 How. 225;
Hamilton vs. Russell, 1 Crouch 309;
Clarke vs. Kounslen, 10 Pet 657;
Bank vs. Bankhardt, 100 U. S. 686;
Thompson vs. King, 111 U. S. 549;
Michigan Bank vs. Elodgwall, 544;
Mitchell Potomac Ins. Co., 183 U. S. 43;
Carter vs. Carnsi, 112 U. S. 478;
Stryker vs. Goodman, 123 U. S. 527;
Rhut vs. Pac. 2 Howard 457;
Ward vs. United States, 14 Wall. 28;
Life Ins. Co. vs. Raddin, Willington, etc., Min. Co. vs. Fulton 205 U. S. 60.

Third. Whether intended or not, the reference by counsel, in the argument to the case of *T. A. L. Ry. vs. Horton*, may have a tendency to confuse the question really presented by this record. That case is cited and insisted on as bearing on this case, while as a matter of fact it has not the most distant application to this case.

That was a case where the state court based its charge on the state law, ignoring practically the law as set out in the federal statute which controlled the case, and the doctrine of assumption of risk was based on the continued use of an appliance whose defects were known to and recognized by the plaintiff below.

while in this case, the accident was confessedly caused by a condition brought about by other servants of defendant and clearly unknown to the deceased engineer.

As to the question, whether the penalty provided for by the rules of this court should be imposed.

If our motion to dismiss writ of error and affirm is sustained, as we think it will be, the court will have seen that the only ground on which the writ of error could have been prosecuted was on the question of assumed risk, which this the court will have held, did not and could not arise on the record and the facts of this case. This point was fully argued on the trial, argued again and disposed of by the district judge on the motion for a new trial, again argued at length and disposed of by the United States Circuit Court of Appeals, and the facts and reasons of the ruling were in all these ways, brought clearly to attention of counsel so, with the highest personal regard and respect for counsel we submit that we can see no reasonsonable ground for this contest in this court. This widow as we conceive it has been without any reasonable or plausible cause, put to unnecessary expense and harmful delay, and if there can be any case, where the rule invoked is applicable we respectfully submit this is a typical case for its enforcement and justice demands that the penalty should be enforced and even then the remedy is inadequate.

McKinney Barton,
Barton & Barton,
Attorneys for Mrs. Ada R. Wright.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD CO., *Plaintiff in Error,*

vs. No. 218.

ADA R. WRIGHT, Administratrix,
Defendant in Error.

REPLY OF PLAINTIFF IN ERROR TO MOTION TO AFFIRM.

H. D. MINOR,
CHARLES N. BURCH,
For Plaintiff in Error.

Paul & Dingham Co., Printers, Memphis.

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REPLY OF PLAINTIFF IN ERROR TO MOTION TO AFFIRM.

As this case is on the calendar for the present term and will in all likelihood be called for argument in January, we have concluded to file a brief on the whole case for the plaintiff in error and, if it is permissible, to let that be considered as our brief on the motion to affirm.

The motion to affirm, however, and the argument in support thereof, contains several suggestions of undue delay, to which we think we should now reply.

The date of the accident and the steps taken in the case as shown by the record are as follows (references are to top paging):

It thus appears that there was a trial within six weeks after the declaration was filed; that the writ of error was sued out within less than two months from the date of judgment and within two weeks after the motion for a new trial was overruled. The transcript was filed within three weeks after the writ of error was granted and the case was argued in the Court of Appeals as soon as called.

There was never a continuance asked for by the plaintiff in error (defendant below) at any stage of the proceedings. At no stage in which the plaintiff in error was bound to proceed did it await anything like the expiration of the statutory time within which it was required to act.

The suggestion in the motion to affirm that the case has been unduly delayed is, therefore, without foundation.

With respect to the charge that the present writ of error is taken for delay merely and that the propositions relied on are frivolous, we respectfully say that, while

we may be in error, we have the utmost confidence in the soundness of the propositions we contend for and submit our brief on the whole case as our reasons for that faith.

It is enough for the purpose of the present motion to point out that the accident occurred in the Railroad Company's yards at Gwin, Miss., by reason of a coal car, standing on one of the yard tracks, protruding a few inches over the lead track on which the engine in question was moving. While one rule of the company (p. 64) provided that cars on sidings in yards should stand clear of all other tracks, there was another rule that "trains and engines must be run with caution when entering or moving through sidings or yard tracks, operating in or through yards must move with trains under control, *expecting to find them occupied*" (p. 61). The deceased engineer had been in the employ of the defendant company, as an engineer, for seven years or more, during a large portion of which time he had operated through these yards at Gwin two or three times a week.

The time was 3:00 o'clock in the afternoon, the lead track on which decedent was moving was straight from the point where he entered upon it, 1,600 feet away from the offending coal car. As he approached the coal car he saw its position and was in doubt as to whether he could pass. This doubt manifested itself in repeated inquiries by him of his fireman. There was nothing to obstruct his view. With the entire situation and the risks incident thereto perfectly obvious, he elected to take the chance of passing in safety. Wherefore, we say he assumed the risk.

It is scarcely necessary to cite authorities on the prop-

osition that an employe assumes not merely risks incident to his occupation which involve no negligence by the master, but also assumes risks arising out of the negligent failure of the master to discharge his duty where such failure on the master's part is obvious or so apparent that any reasonably prudent man would have observed it.

Choctaw, etc., R. Co. vs. McDade, 191 U. S., 68.
Texas, etc., R. Co. vs. Harvey, 228 U. S., 324.
Seaboard Air Line vs. Horton, 233 U. S., 492.

The following proposition, well stated by Mr. Labatt, is supported by any number of authorities:

"A servant will be affirmed or denied to be chargeable with knowledge of a given risk, according as it is considered that a reasonably observant person possessing his natural and acquired capacity for observation would or would not have ascertained the existence of that risk, if he had made a proper use of the means or opportunities of knowledge which were available before the injury in suit was received by him. * * *

If there is any evidence going to show that the servant had an opportunity of ascertaining the existence of the risk in question, the employer is entitled to have the jury instructed to the effect that a servant having an opportunity to know of a risk is presumed to know of it."

4 *Labatt's M. & S.*, Sec. 1320.

"If the doctrine of assumed risk applied to this case, it was because the alleged defect was so palpable and visible that Harvey was assumed to know of it, although there was no direct proof upon the subject, and, by continuing to work, to have taken upon himself the hazard of injury from that source."

Texas, etc., R. Co. vs. Harvey, 228 U. S., 324.

As indicating the deceased engineer's complete knowledge of the situation, the following excerpt from the testimony of the colored brakeman, who was on the engine *and on the engineer's side of the engine* at the time of the accident:

> "Q. Both of you looking down the way the train was going?
>
> A. Yes, sir.
>
> Q. Did you see any cars near the track on which your train was going?
>
> A. Yes, sir.
>
> Q. Now, just tell the jury what you saw, and what you said, if anything?
>
> A. I was looking ahead, and seed them, and I spoke to him and told him it didn't look like them cars was in the clear.
>
> Q. Whom did you make that remark to?
>
> A. Mr. D. C. Wright.
>
> Q. You told the engineer?
>
> A. Yes, sir.
>
> Q. Then what was said and what was done?
>
> A. I spoke and told him of it, and he asked the fireman was they clear, and the fireman was putting in the fire at the time, and when he got through, he looks ahead, and he told him they wouldn't clear, and he didn't understand the fireman and he asked me what he said, and I said he said they wouldn't clear, and the fireman had done jumped off, and he leaves his side to go to the fireman's side to see if they would clear, and I jumped off after he left his side."
>
> Rec. 74 (80).

The road thus presents quite clearly the case of an engineer who had probable knowledge and certainly abundant means of knowledge. The whole situation was before him and his repeated inquiries of his fireman indicate he had it in mind. Therefore, he deliberately and voluntarily "encountered the risk."

The train was properly equipped. In the course of the trial, plaintiff's counsel voluntarily withdrew the charge that the train was not properly equipped.

Record, p. 77 (83).

The learned trial judge was of the opinion that the defense of assumption of risk, so far as it applied to cases wherein the master was guilty of any negligence, was abolished by the Employers' Liability Act. He therefore declined to decide for himself or to allow the jury to decide whether the facts constituted an assumption of risk under the rule of the common law.

For example, when counsel for the defendant undertook to show that tracks in the yards were frequently occupied, wholly or partially (p. 67), there was an objection which the Court sustained, saying:

> "I have stated that my ruling on the law is that the doctrine of assumption of risk has been abolished by the act of Congress, except where the carrier or employer is not guilty of negligence."
>
> Record, p. 67 (73).

That this was error is clear since the decision in the Horton case. The Court of Appeals, without expressing itself on that view of the law, held that there was no assumption of risk because the engineer had exercised proper care to discover the danger, that is, by inquiring of his fireman, but as the situation was perfectly obvious and had clearly come to his attention an appreciable time before it was too late to avoid it, his care, or want of care, is not the determining fact. For, as pointed out in the cases above cited, even though the situation may result from the negligence of the master, the em-

ploye will be held to have assumed the risk and will be precluded from recovering if the situation was observed by him, or was so obvious that he should be charged with knowledge of it—this entirely without regard to the negligence or non-negligence of the employe in dealing with the situation.

An effort is made by defendant in error to say that the case presents one of contributory negligence and not of assumption of risk. This confusion of the two defenses is referred to in the Horton case where the Court points out that the non-liability of the master where the servant is injured by an appliance which he continues to use after knowledge of its defective condition rests on the doctrine of assumed risk and not contributory negligence. And, as pointed out in the case of *Kane vs. Railroad*, where the situation is obvious, the employe assumes the risk, including that arising from his own handling of the situation.

Kane vs. Railroad, 128 U. S., 94-95.

For the foregoing reasons, which are emphasized in our brief on the whole case, where the authorities are reviewed at length, and which we hope to be allowed to present more fully in oral argument, we respectfully say that the case was clearly one of assumption of risk—so much so that the trial court would have been justified in peremptorily instructing the jury to that effect. In any event, the defendant was entitled to have the question submitted to the jury.

The concluding paragraphs in the motion to dismiss or affirm are as follows:

"This writ of error was then prosecuted and defendant took advantage of all of the delay allowed and failed to have the record printed until a few weeks ago. Plaintiff, the poor widow, was unable to have it done and this case, more than four years after the death of the plaintiff's husband, is still pending."

Nothing in this excerpt is of any pertinence to this motion and nothing in it, except the statement in the first line, finds any support in the record.

Respectfully submitted,

H. D. MINOR,

CHARLES N. BURCH,

For Plaintiff in Error.

We acknowledge receipt of copy of the foregoing brief.

BARTON & BARTON,

For Defendant in Error.

Memphis, Tenn., Nov. 7th, 1914.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *v.* WRIGHT.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 218. Argued December 2, 1914.—Decided December 14, 1914.

Where there is no contention as to the meaning of the Employers' Liability Act, this court, in a case where the judgment of the District Court has been affirmed by the Circuit Court of Appeals, need only determine whether plain error was committed in relation to the principle of general law involved.

In this case the only error pressed being that the court below held that there was no assumption of risk by the injured party, and as it is impossible to deduce any assumption from the facts stated, the judgment is affirmed.

207 Fed. Rep. 281, affirmed.

THE facts, which involve the validity of a judgment for damages obtained by the administratrix of an employé of a railroad company under the Employers' Liability Act, are stated in the opinion.

Mr. H. D. Minor, with whom *Mr. Charles N. Burch* was on the brief, for plaintiff in error:

As this case involves no violation of any safety appliance act, the defense of assumption of risk is open as at common law. *Seaboard Air Line* v. *Horton*, 233 U. S. 492; *Southern Ry.* v. *Crockett*, 234 U. S. 725.

The defense of assumption of risk was duly set up in both courts below and in the assignments of error in this court.

Among the rules prescribed for the protection of engineers was one requiring them to move their trains with caution over yard tracks, expecting to find them occupied. The deceased engineer had frequently operated through these yards, and knew the usual situation there. The risk was, therefore, one ordinarily incident to his employment and was assumed by him.

Even where the situation which was responsible for the accident was due to the master's negligence, yet if the situation was observed by the servant or was so obvious that an ordinarily prudent person would have seen and appreciated it, the servant assumed the risk. *Washington &c. R. R.* v. *McDade*, 135 U. S. 234; *Choctaw &c. R. R.* v. *McDade*, 191 U. S. 68; *Tex. & Pac. Ry.* v. *Harvey*, 228 U. S. 321, 324; *S. A. L. Ry.* v. *Horton*, 232 U. S. 292; *Tex. & Pac. Ry.* v. *Archibald*, 170 U. S. 673.

Where the knowledge of the situation on the part of the servant is equal to that of the master and he afterwards voluntarily encounters it, he assumes the risk and cannot recover. *Fletcher* v. *Railroad*, 102 Tennessee, 7; 3 Labatt's M. & S., § 1184.

The doctrine of assumption of risk is not confined to risks existing at the time the contract of employment was entered into, but applies to dangers which subsequently arise and which became known to the employé or which were so plainly observable that he must be presumed to have known them. *S. A. L. Ry.* v. *Horton*, 233 U. S. 492; *Railroad* v. *Ponn*, 191 Fed. Rep. 682.

The evidence in this case shows that the engineer elected to take the chance of passing safely. Therefore, he assumed the risk.

Failure to find that there was any assumption of risk, because there was nothing to show that the engineer was chargeable with the knowledge of the danger and voluntarily exposed himself to it, was clearly error; for the true test is not in the exercise of care to discover dangers, but

whether the defect is known or plainly observable by the employé. *Choctaw &c. R. R.* v. *McDade*, 191 U. S. 68.

Plaintiff's case cannot be saved by the claim that it was a matter of contributory negligence and not assumption of risk. *S. A. L. Ry.* v. *Horton*, 233 U. S. 492.

There was no negligence on the part of the master.

The railroad company was not chargeable with negligence merely because a car on one track protruded on another track. Engineers were warned that they must expect to find such conditions and instructed to act accordingly.

There was no negligence on the part of the fireman.

There being testimony which clearly went to show assumption of risk by the decedent, the Circuit Court of Appeals should not, in view of the error of the trial court, have affirmed the case on the ground that the evidence showed no assumption of risk, but should have remanded the case for a submission of that question to the jury at least. *Slocum* v. *N. Y. Life Ins. Co.*, 228 U. S. 387.

Mr. R. M. Barton, with whom *Mr. McKinney Barton* was on the brief, for defendant in error.

Memorandum opinion by direction of the court, by Mr. Chief Justice White.

While this second appeal rests on the Employers' Liability Act, there is no contention as to its meaning (207 Fed. Rep. 281); hence we need only determine whether plain error was committed in relation to the principles of general law involved.[1]

Error in holding that the facts afforded no ground for the application of the doctrine of assumption of the risk is the sole contention pressed in argument. A freight train

[1] *Chicago Junction Ry.* v. *King*, 222 U. S. 222; *Seaboard Air Line* v. *Moore*, 228 U. S. 433; *Chicago, R. I. & Pac. Ry.* v. *Brown*, 229 U. S. 317; *Southern Railway* v. *Gadd*, 233 U. S. 572, 577.

of which the deceased was engineer, proceeding southward on a lead track, approached or was traversing a railroad yard. Ahead—the distance not being specifically defined—on a yard track connecting with, and to the left of, the lead track there stood some loaded coal cars which, while visible to the engineer from the right side of the engine, became more and more shut off from his view as the train advanced. The engineer asked the fireman, who was on the left side of the engine and therefore in full view of the cars, whether they were clear of the lead track and was answered that they were. There is a dispute as to whether a head brakeman was riding in the cab and whether subsequently, if there, he called the engineer's attention to the fact that the coal cars were not clear. But there is no dispute that the engineer again asked the fireman who answered that the cars were not clear and jumped from the locomotive. The engineer, having shut off his power, stepped to the left side where from the collision which immediately resulted he received the injuries from which he subsequently died.

Whatever may be the difficulty of distinguishing in many cases between the application of the doctrine of assumption of risk and the principles of contributory negligence, that there is no such difficulty here is apparent since the facts as stated absolutely preclude all inference that the engineer knew or from the facts shown must be presumed to have known that the coal cars were protruding over the track on which he was moving and deliberately elected to assume the risk of collision and great danger which would be the inevitable result of his continuing the forward movement of his train.[1]

[1] *Union Pacific Railway* v. *O'Brien*, 161 U. S. 451; *Texas & Pacific Railway* v. *Archibald*, 170 U. S. 665; *Texas & Pacific Railway* v. *Behymer*, 189 U. S. 468; *Choctaw, Oklahoma &c. R. R.* v. *McDade*, 191 U. S. 64; *Schlemmer* v. *Buffalo, Rochester &c. Ry.*, 205 U. S. 1, 12; *S. C.*, 220 U. S. 590; *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 503-504.

The impossibility of deducing assumption of the risk from the facts stated is cogently demonstrated by the arguments advanced to establish that the risk was assumed. Thus it is urged that as in a railroad yard there was danger to arise from the protrusion of cars negligently placed by employés of the company, a danger which the engineer must have known might arise, therefore he assumed the risk of such danger. And again the argument is that even although the engineer did not know of the protruding cars and therefore did not consciously incur the great risk to result from the collision, yet as by proper precaution he could have discovered the fact that the cars were protruding, he must be considered to have assumed the risk which resulted from his want of care. But both these arguments have no relation to the doctrine of assumption of the risk and only call for the application of the principle of contributory negligence or of fellow servant.

Affirmed.